

"IMPLIED TERMS IN AGENCY CONTRACTS"

THESIS FOR THE DEGREE OF D. Phil IN LAW
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Submitted by

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INTRODUCTION

When a person chooses to write a thesis on any subject, he has usually some purpose. In any case there should be some justification for doing so. There is both, a purpose and a justification for writing this thesis. The purpose is to explore the development of Indian Law on implied terms in agency contracts, and to make use of the mine of information furnished by a study of English and American materials available on the subject. Further, it is hoped to make suitable recommendations for amendments to Indian statute Law, and to advise humbly a change in Indian judicial outlook, if on careful examination of these materials some useful thought may develop that can be utilized with profit, having due regard to the environmental and other differences existing between this and other foreign countries.

The justification for writing this thesis is two-fold. First, there is real need for investigation of the wide scope of the subject; from a practical point of view, to acquaint principals, agents, as well as third parties who may establish contractual relationship with either of them, as to what is precisely the State of the law governing them. More particularly, it is hoped that this study will be of assistance to

members of the bar, and even perhaps to the judiciary itself, in compiling materials, in pointing out lacunae and in clarifying ambiguities. Agency is an important, even essential branch of commercial law; certainly a more complete knowledge of it will be conducive to the growth of commerce, which today is assuming, so important a place in the changing pattern of Indian society.

Second, certain portions of the law of agency are embodied in Chapter X of the Indian Contract Act, 1872, and that is a very old enactment. It is, therefore, very necessary to examine this enactment to find out to what extent they may need revision in view of the vast changes that have taken place during the past nineteen years. Law, if it has to serve its purpose, must keep pace with the changing pattern of society and laws enacted so many years ago cannot be expected to keep abreast of modern developments. Prompted by these ideas, the author proposes to make a humble endeavour to explore the subject and offer his own thoughts.

One question, obvious enough, may puzzle the reader. This concerns the choice of the title of this thesis. Though throughout there will be a discussion of the implied authority of an agent, the title adopted is "implied terms" rather than "implied authority". There are two reasons for the choice of the title. They are, first, "implied terms" cover not only acts which an agent can do to bind his principal as against a third party but also cover those cases where an agent has some rights

or obligations only in reference to his principal or vice-versa and the third party's rights and obligations are not in the picture at all.

Second, at a later date the author proposes to write a more comprehensive thesis on "Implied terms in Contracts Generally" and in order that the present inquiry could be made a part of it, the present title of this thesis has been chosen.

It must, however, be made clear that for the present it is proposed merely to examine the scope of implied authority of agents so far as they bear on the rights and obligations of third parties. However, for a better comprehension of the scope of this inquiry it appears necessary, briefly, to examine the theory upon which "these implied terms" rest.

While it is correct to state that the broad proposition of law is that generally, the rights and obligations of parties, to a contract of agency, are mainly and usually drawn from the express terms of a contract, written or oral, it cannot be denied that many terms can be added to the contract by implication. This is because parties enter into a contract against a certain background; and it is hard to conceive of a contract as merely isolated act, in the large majority of cases. Frequently, we have a background of familiar usage or custom or course of dealing; occasionally necessity or emergency play part too; there are certain terms which are implied by statute; in many cases the courts have drawn implications to be added to the written terms of a contract on the ground of giving "business efficacy" to the contracts to be construed by them.

It is not proposed to examine here the ingredients of customs or usages of trade and the tests laid down by the courts for their incorporation as terms in a contract. This aspect of the matter will be fully discussed in Chapter V of this thesis. In fact, it is not too much to say that custom or usage of the trade has played a conspicuous part in the development and construction of modern, commercial law. The general ambit of the contractual obligations are usually provided in the written terms of a contract, but very often the parties may omit through inadvertance or clumsy draftmanship, to cover an incidental contingency, and if the law did not permit their incorporation in the terms of a contract, the inevitable result would be to negative their design. In such a case, Judges have themselves supplied terms which have had the effect of implementing the presumed intention of the contracting parties. The idea of the Judges always is to give "business efficacy" to the contract. A reasonable explanation has often been offered by the Courts for doing so. They have said time and again that they are merely trying to do that which the parties themselves would have done had they thought of the matter.

The Judges have long assumed to exercise this function many years ago. Turning for a moment from implications of authority to the area of implied contracts generally, one of the leading cases in England, decided many years ago, sets out most admirably the theory behind these implications. In the case of the Moorecock¹, the defendants, Wharfingers, had entered

1. (1869) 14 P.D. 64.

into a contract with the plaintiff for the landing and storing of certain cargo so that the plaintiff, a ship-owner, could discharge his vessels at their jetty. The jetty extended into the river Thames. The parties realised that the vessel would be grounded at low water. While the vessel was being unloaded, the tide ebbed and she settled on a ridge of hard ground beneath the mud. The plaintiff brought an action for the consequent damage. There was no evidence that the defendants had ever guaranteed the safety of the anchorage nor was title to the bed of the river adjoining the jetty vested in them, but in the Thames Conservators. It is illuminating to note the relevant portion of the judgment delivered by Bowen, L.J., "I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this unforeseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction."

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The principle of the case has often been invoked by the courts. They have, however, applied this with caution, and it must be said that such an attitude has been very proper. It has been recognised by the courts that, though it is expedient in the interests of justice to recognize this principle, at the same time it is equally necessary not to give it too much elasticity; accordingly they have set limits to its employment. Thus, in subsequent cases the courts have laid down that an implication should not contradict or vary the express terms of the contract. Nor can it be made use of, to render contracts more attractive in the eyes of reasonable men. Obviously, it is for the parties and not the function of the Judges, to determine the nature of their liabilities. The limitations, imposed by the courts to the employment of the principle laid down in the Moorcock, has been succinctly expressed by Mac Kennon L.J., in Shir Law v. Southern Foundries² (1926) Ltd., in these words :

"Prima facie that which in any contract is left to be implied need not be expressed is something so obvious that it goes without saying so that, if while the parties were making their bargain an officious by stander were to suggest some express provision for it in their agreement, they would testify suppress him with a common, 'oh!, of course'".

It is hard to believe that the problem — when to imply terms, is so simple as suggested by the learned Judge. Such problems continually pose themselves before the courts and the

principle stated in the case has not been found to be of any great help in resolving them.

The Courts have presented two different views regarding the principles that should govern the incorporation of implied terms into a contract. One view is that the object of implying a term into a contract is to give effect to the intention of the parties. For this reason it is necessary to recognize that they cannot imply a term which will contradict or vary the express terms of a contract. Two propositions of law emerge out of this view; first, positively a term can only be implied if it is necessary in the business sense to give efficacy to the contract as intended by the parties, and it can confidently be said that the term left to be implied, though unexpressed is so clear and obvious that it goes without saying³. Second, negatively no term can be implied if it conflicts or is inconsistent with the intention of the parties, as expressed in their agreement. The second view may be expressed thus : The circumstances in which terms will be judicially implied appear to have been extended and a justification for their imputation in those circumstances has been stated somewhat differently. In the Law Quarterly Review⁴, it is observed that : "It is obvious that no contract can ever be drawn in so completed form that it may not become necessary, if unforeseen circumstances arise, for the court to imply terms which were never contemplated by the parties when the contract was made."

3. *Rugate v. Union Manufacturing Co.* (1918) 1 K.B. 592, 605.

4. Vol. 71 (1955) p. 457.

The observation of Denning J., in his famous judgment in the Movietonews⁵ case went a good deal further when he declared that "the day is gone when we can excuse an unforeseen injustice by saying to the sufferer 'it is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.' We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a chalmers." According to this view, the courts can adjust the right and obligations of the parties having regard to circumstances not provided for by their contract.

In Hivao Ltd. v. Park Royal Scientific Instruments Ltd.⁶, the Court held that there could be implied in the contract of employment a term that the servant undertakes to serve his master with good faith and fidelity.

In Martin Baker Air Craft Co. Ltd. v. Flight Equipment⁷, the Court held that in a contract of manufacturing agency which contained no provision for its determination, there was an implied term that the contract could be determined on the serving of a reasonable notice of twelve months duration.

The nets have been cast too wide by the courts in England in introducing the theory of the 'implied term' as applicable to

5. British Movietonews v. London and District Cinemas Ltd., (1951) 1 K.B. 190, 202.

6. (1946) Ch. 169.

7. (1957) A. C. 555.

frustration of contract cases for there it is obvious enough that the unforeseen change of circumstances could never have been in the contemplation of the contracting parties. Discussing the subject of frustration of contracts, Lord Wright wrote in one of his Essays thus⁸ : "that the Court or Jury as a judge of fact decides the question in accordance with what seems to be just and reasonable in its eyes. The judge finds himself the criterion of what is reasonable. The court is in this sense making a contract for the parties, though it is almost blasphemy to say so."

In implying terms into a contract the social and economic background can be taken into consideration. For example we find that duties between employer and employee in the light of changing circumstances are today attracting the attention of the Courts. A striking illustration of the way in which the courts approach this question is found in the case of Lister v. Ice & Storage Co.⁹. The issue in this case was, whether in the absence of express agreement, an employer of a lorry driver was bound to take out such an insurance policy against third party risks as would protect only the employer himself or whether he was bound to protect the employee also. It was argued on behalf of the employee that there was an implied term in the contract of employment that the employer would protect the employee by insurance. On the decision of the important question, the Judges were divided both in the court of Appeal and in the

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House of Lords. In fact, it may be pointed out, blasphemy though it be - the issue turned on the judges views of social policy. A perusal of speeches in the House of Lords convinces us that what principally weighed with the majority of the judges seems to have been the view that it would be contrary to the public interest if professional lorry drivers were immune from liability for negligence. One of the dissenting judges, however, pointed out that owner-drivers were so immune (as a result of insurance) and he did not see why professional drivers should not also be immune. Though the majority turned down the plea of such implication, the minority opinion discloses that questions of implication do arise on the ground of changed social and economic environments. Various contractual relationships when examined in the light of changing pattern of modern society may invite the attention of the courts for implying terms into a contract, and some of the cases noted earlier; warrant the inference that they are living questions. It is suggested that law must change in response to changed conditions of life, otherwise it will cease to be a living law; society if it finds it useless will sweep it aside on its onward march.

In evaluating the two opposing views, expressed by the courts, it must first of all be borne in mind that the second view is largely supplementary to the first. There is no doubt that so far as the first view goes, the principles therein stated are incontestable, for the simple reason that the main idea of implying term into a contract is to give expression

to the presumed intention of the contracting parties. What we require to assess is whether the first view requires to be supplemented or developed or must it be regarded as a closed chapter. If our conclusion is that it requires to be extended in its scope a necessary question arises, and it is whether the second view supplements it within desired legal limits. It is submitted that we have to examine the question from this angle. In the opinion of the author, the first view is unassailable so far as it goes but it requires to be extended. Law must of necessity grow to keep itself abreast of modern developments in society, if it is to serve any real purpose. Justice Holmes uttered a profound truth in stating "The Law" he observed "is always approaching and never reaching consistency. It is for ever adopting new principles from life at one end, and it always retains old ones from history at the other ... It will become entirely consistent only when it ceases to grow". It is submitted that so long as the second view is not so utilised as to transgress the bounds of law, it will serve the great purpose of developing law on proper lines, and will help to maintain equitable justice between the contracting parties. It is, therefore, suggested that the second view may be helpful in developing the law provided it is applied with caution. While there is every justification for implying terms into a contract on the ground that an examination of modern social and economic life warrants that inference, it will be fatal to the growth of law if terms are implied in cases the effect of which would be that in fact the court steps in the shoes of the contracting

parties, as in frustration cases. The two opposing views, cover the area of contracts generally and will be undoubtedly of help in the study of implied terms in agency contracts, which we now propose to explore. An endeavour will be made, also to indicate how far in the study of this area of our investigation these two views are of help and assistance. An evaluation of their respective merits will then alone be possible. It will not be out of place to note the view of the Supreme Court of India regarding their preference of one or other of the two opposing views.

In K.L. Kapur v. M/s Delhi Cloth & General Mills Co. Ltd.¹⁰, the question arose as to the principles applicable for implying terms in a contract, and Wanchoo J. delivering the judgment in the case stated the law thus :

"The principles on which a term may be implied in contracts are well settled and it is enough to refer Halsbury's Laws of England, Vol. VIII, Third Edition, p. 121, where they are summarised as follows :

In construing a contract, a term or condition not expressly stated, may, under certain circumstances, be implied by the courts if it is clear from the nature of the transaction or from something actually found in the document that the contracting parties must have intended such a term or condition to be a part of the agreement between them. Such an implication must in all

10. Civil Appeal No. 39 of 1958 decided on 30-8-1961 by the Supreme Court of India per K.N. Wanchoo, K.C. Das Gupta and J.C. Shah, JJ.

cases be founded, on the presumed intention of the parties and upon reason; and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have, and to prevent such a failure of consideration as could not have been within the contemplation of the parties . . ."

Proceeding further his Lordship Justice Vanehoo observed: "If a term is to be implied in business transactions, it must be such as to give such business efficacy to the transaction as must have been intended at all events by both the parties who are businessmen." On the facts of the case, there could hardly be any controversy that the suggested terms could not be implied, and for this reason it will serve no useful purpose to examine the facts of the case. The principles laid down in the case show that the Supreme Court of India is inclined to follow the first view, which may, for the sake of convenience, be styled, as the "circumscribed view". However, it cannot be said that if and when any case of importance, involving a thorough discussion and adoption of either of the two opposing views, comes for consideration, which view will find acceptance by the Supreme Court. In the above case, a discussion of the two opposing view points was not called for, and it is, therefore, pre-mature to state with confidence; the leaning of the Supreme Court in this regard with any exactness. In the succeeding chapters, it is proposed to examine the distinct sources of implied authority of an agent, and also the problems of policy and purpose that underlie the principles of law on the subject one by one which, it is hoped, will be conducive to clarify.

CHAPTER IAGENT'S IMPLIED AUTHORITY ARISING
OUT OF THE CIRCUMSTANCES OF THE
CASE U/S 187, INDIAN CONTRACT ACT

The subject of the implied authority of an agent is governed in India by statutory law. It does not admit of categorised classification as one finds in the laws of foreign jurisdictions, notably of England and America. According to the English common law, and the American Restatement of Agency, the following different sources of implied authority are discernible; they are :

- 1) Course of dealing
- 2) Apparent
- 3) Incidental
- 4) Necessity or Emergency
- 5) Custom or usage of the trade, and
- 6) Estoppel.

These different classifications of implied authority will be discussed later on. At present, however, an attempt would be made to examine critically the provisions contained in Sections 187 to 195 of the Indian Contract Act (1872), that bear on the subject of the implied authority of an agent.

Before examining these, it will not be out of place to mention, as a passing remark, with a single exception that the

Indian statute does not specifically mention Custom or usage of trade as a source of implied authority, though recognition is given to it in the decisions of the Indian High Courts. This is undoubtedly a serious lacuna, especially so when custom or usage of trade is specifically mentioned as a ground for giving authority to an agent to employ a sub-agent under the provisions of Section 190.

For easy reference, Section 137 of the Indian Contract Act is reproduced below :

"An authority is said to be express when it is given by words spoken or written. It is said to be implied when it is to be inferred from the circumstances of the case, and things spoken or written, or the ordinary course of dealing may be accounted circumstances of the case."

A critical examination of this section in the light of case law reveals the scope to be very wide. The types of the authorities styled apparent, course of dealing and custom or usage of the trade etc. in foreign jurisdictions such as England and America are included by Indian decisions within the expression "circumstances of the case".

A case in point is Shah Muhammad Khan v. Ahmad Ali Khan¹. There a suit was filed by the plaintiff-appellant, a merchant in Lucknow, against the defendant-respondent, the Raja of Salempur, for the recovery of the price of cloth alleged to have been purchased by the defendant-respondent. The plaintiff claimed Rs. 3,633/- for the price of the cloth, and Rs. 3,117/- for interest at the rate of 12% per annum; the total amount being

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Rs. 6,750/-. The defendant denied the claim in toto. It was admitted in the lower court, as well as before the Chief Court that Sarfarnaz and other servants of the Raja of Salempur, who admitted their purchases of cloth, were servants of the defendant at the time when the purchases in dispute were made. The only question for consideration of the above Chief Court was whether these agents had purchased the cloth for the defendant, and whether they had authority to do so on his behalf. It is important to bear in mind the special circumstances of the case. The plaintiff alleged in his plaint that he had been supplying cloth to the defendant's father, and that the practice had been for the defendant's father to send for the cloth through servants from the shop of the plaintiff. It was also alleged that a detailed account used to be sent with the cloth and the price used to be paid subsequently, and that after the death of the defendant's father, the defendant also continued the same practice in respect of the purchase of the cloth, and the payment of the price. This particular allegation was admitted without qualification in the written statement. On these facts the Oudh Chief Court laid down the following principles of law, which may be quoted :

"Section 186, Contract Act provides that the authority of an agent may be expressed or implied. In cases where the authority is not expressed, the question whether an agent had or had not authority to act in a particular matter on behalf of the principal is to be decided according to the circumstances of each case. Having given our careful consideration to all the

circumstances of the case we are of opinion that there is no reason to disbelieve the plaintiff, and the servants who made the purchases in dispute must be held to have had implied authority to do so on behalf of the defendant. The fact that the defendant has paid large sums, on account to the plaintiff, seems to us to be very strong circumstances and almost conclusive against the defendant."

It should be noted that in this case there was a well established practice that cloths were purchased by the servants of the defendant, and were paid for afterwards by their master, the Raja of Salempur. This well established course of dealing between the parties concerned, according to the decision of the aforesaid case, can be regarded as circumstances of the case. As a matter of fact, the language of Section 187 is itself very clear where it stated that the ordinary course of dealing may be accounted circumstances of the case. Though the case is important from the angle that it emphasizes that a well established practice would be regarded as a course of dealing, and a strong circumstance conferring authority on an agent to bind his principal; nevertheless the Oudh Chief Court does not clearly state as to what were the other circumstances, besides course of dealing on which they decided the case. The scope of the term "circumstances of the case" is indeed very wide, and at an appropriate place the author would like to discuss the scope of it.

Another case in point is Mat. Suga Kuer v. Firm Brijraj

Ramnirao and others², in which Justice Howland of the Patna High Court laid down an important principle of law in these words :-

"The person claiming against the principal must show that the act done was within the scope of the authority or ostensible authority held or exercised by the agent and this can be shown by practice as well as by a written instrument ... The plaintiff, therefore, must show a course of dealing by which it was a practice for goods to be supplied to her through these servants in the course of their employment. If he shows such a practice, it will be no answer for the defendant to say that the particular items of goods did not reach her once the plaintiff has established that they were supplied to her servants for her use."

Undoubtedly, the principles laid down in the aforesaid case are important, but it does not appear from the case as to whether an agent, if he does certain work on behalf of his principal, and the way he acts with him, ^{the third party} had been subsequently accepted by the principal, will that practice only bind the principal so far as the dealing of that agent is concerned with that specific party or will such a practice further confer an implied authority in him to do similar work with another person.

Manohar Lal v. Mst. Sakina Begam and others³ is an ^{Case} important, inasmuch as the Oudh Chief Court laid down an important

2. A.I.R. 1927, Patna, 526.

3. A.I.R. 1917, Oudh, 235.

proposition of law that the circumstances of the case and a course of dealing determine the extent of the implied authority of an agent. In the aforesaid case, the power of the authority was executed by the plaintiff in favour of Mangali Prasad. Though it was not produced before the Court, but the Court observed that from the admitted facts of the case, Mangali Prasad had an authority to receive the money, and, therefore, it could be presumed that he had authority to do every lawful thing which was necessary in connection with that act. The court observed that on previous occasions moneys had been realized from time to time on account of over due instalments and every such payment was accepted in full satisfaction of the instalment on account of which it was made. On these facts, the Court stated :-

"We are satisfied in the case, both from the circumstances and the previous course of dealings, that the agent did not exceed his authority in accepting the payment of the instalment on behalf of his master and that the plaintiff acquiesced in, what his agent had done when he received the money and objected only to the detrayal of the cost of registration by him."

Although it can be hardly doubted, that the principle laid down in the aforesaid case is important as indicative of the scope of section 187 of the Indian Contract Act, it does not throw any light on the question as to what is the essential test to determine a course of dealing, or the nature of the circumstances which would entitle a Court of Law to pronounce

whether on account of those circumstances an agent is clothed with implied authority.

Though unreported, Sita Ram v. Banwari Lal⁴ may be regarded as an instructive case on the subject of implied authority of an agent, the learned Judges of the Madhya Bharat High Court laid down the following principles of law in this case :

"An authority is generally construed in case of doubt according to the usual course of dealing in business to which it relates partly because this may be presumed to be really intended and partly because the third party may reasonably attribute to the agent such authority as agents in the like business usually have. Held on the facts . . . in a business concern the Munim could receive the money and pass a valid receipt."

Bank of Bengal v. Ramanathan Chetty⁵, decided by their Lordships of the Privy Council is an excellent case, showing the importance of a course of dealing as a ground for conferring implied authority on an agent to carry on business in a particular way. The following passage from the judgment is quoted below :-

"On the evidence . . . it was proved that amongst such Chetty money lending firms it was the practice for the agent to pledge the credit of the firm and that for a considerable time

4. A.I.R. 1955 (N.U.C.) Madhya Bharat 3374.

5. 43 Calcutta, 527, P.C.

similar transactions had been entered into previously by the agent without his authority being questioned."

The importance of this case lies in the fact that it emphasizes that a well established practice can be a source of implication of an authority of an agent, and further that in a money lending firm the agent normally will possess the authority to pledge the credit of the firm as in business of such a kind such work is usual.

An agent may have implied authority to act in a particular manner on behalf of his principal, on the basis of a course of dealing. A very common instance of this type of authority is found in cases where an agent has exercised some power, repeatedly, not given to him by his principal, who raises no objection to the exercise of such power by his agent even on coming to know of the same. The principal, accordingly tacitly sanctions the continuance of the practice.

In an American case - Dobbs v. Zink⁶, an agent was authorised to make loans for his principal and to collect interest but not originally to collect principal. In his dealings with third parties, the agent repeatedly collected principal and remitted it to his principal, who received it without objection. It was found at the agent's death that he had also collected principal which he had not accounted for. The principal sought to hold the borrower liable for payment of the principal sum on the ground that the agent had no

6. (1927) 290 pa. 243, 138 All. 758.

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authority to receive the principal but possessed merely a power to collect interest. On these facts, it was held by the Court that as the agent had repeatedly received other items of principal and it was never objected to by his principal, implied authority to collect principal in general had been given.

Agency could be proved, the Court said, "by showing either a Contract of Agency or circumstances to prove implied authority by a course of dealing on the part of the agent in a particular capacity, and recognition of his acts by the principal."

There can be no implied authority to collect payments if the principal gives notice to the purchaser. But, authority to collect may be implied from the fact that an agent has previously received payments and these collections have been approved by the principal.⁷ The authority may be derived from a single act of the agent and the recognition of it by the principal if it is of such a character as to lay the authority to the agent to do similar acts for the principal beyond any question.

The last mentioned case, though it lays down a very important principle of law regarding the scope of a course of dealing, in giving implied authority to an agent, it does not, however, clearly specify the circumstances as to what type of acts will confer an implied authority in the agent to do similar

7. Grant v. Humerick, 123 Iowa 571, 94 N.W. 510 (903).

8. Wilcox vs. Chicago, Milwaukee & St. Paul R.R. Co.
24 Minn. 269 (270) (1877).

acts. The importance of course of dealing as a source of implied authority of an agent appears to be a very convenient mode whereby an agent, though not expressly authorized, may exercise an authority on his behalf, provided he understands the mind of his principal, and does certain acts which are subsequently approved by him, and then, thereafter a practice gives him a necessary authority to do similar acts. In business transactions it is not always possible for an agent to receive instructions from his principal, and, therefore, it is conducive to do an act with efficacy for an agent, and he, knowing very often the mind of his principal, can transact business on the assurance that it will be subsequently accepted by his principal, so the course of dealing occupies a predominant place as a source of implication of authority for an agent.

It is unfortunate that there are only two cases bearing on apparent authority of an agent in India. Dehradun Mussoorie Electric Tramway Co. Ltd., and another, Defendant-appellant versus Jagmandar Das and others, plaintiff-respondents⁹ is a case in point, though dealing with Company Law, may still be regarded as relevant to our inquiry, as the principles are essentially the same. Some important points of difference may, however, be borne in mind between a director of a Company as an agent of the Company and an ordinary agent under Contract Law. A director is an agent of the Company in his contractual capacity and he is a trustee in respect of the company's properties. With these differences in mind, the facts of the case may

9. A.I.R., 1932, Allahabad, 141.

be briefly stated thus :-

The plaintiffs were the proprietors of a bank at Dehra-dun and the Company had an account with that Bank. On 19th January, 1923, the plaintiff allowed the Company, at the request of the Managing Agent, Mr. Beltu Shah Gilani, an overdraft of Rs. 25,000/-. The mortgage deed in suit was executed on 19th June, 1923 by Mr. Beltu Shah on behalf of the Company in favour of the plaintiffs to secure the overdraft. The defendants admitted receipt of the consideration by the Company. The defendants did not object in treating the plaintiff as unsecured creditors; their only objection was that the mortgage was void and not binding on them for various reasons. It is not necessary to examine the various grounds of objection raised in the case challenging the validity of the mortgage deed as the Court found that the necessary permission not having been obtained by the Government had rendered the mortgage ~~void~~ void.

The only point of importance that arose in the case was whether the Managing Director had power to borrow money and execute the mortgage deed under the circumstances of the case. The learned judges of the Allahabad High Court relying on an earlier case, Ram Narain Singh v. Mufassil Bank Ltd.¹⁰, of the same Court, laid down the following principle of law". . . a company is liable for all acts done by its Directors even though unauthorized by it provided such acts are within the apparent authority of the Directors and not ultra vires of the

10. A.I.R. 1925, Allahabad, 206.

company. Persons dealing bonafide with a managing Director are entitled to assume that he has all such powers as he purports to exercise if they are powers which, according to the Constitution of the Company, a Managing Director can have. We agree with the Court below therefore in finding that the Company is bound by the mortgage so far as company law is concerned."

The principle of law stated above is correct, and is also supported by various English decisions e.g. (Royal British Bank versus Turquand)¹¹. It is unfortunate that the learned judges have not explained the meaning of the term "apparent authority". The legal profession in India, and scholars of law cannot rely upon the discussion as being in any manner helpful to them for tracing the development of Indian Law relating to apparent authority of an agent.

The other case in point is Ram Pertap versus Marshall¹². The facts of the case may be briefly mentioned as follows :-

Ram Pertap, the appellant was the son and legal representative of Babu Girdhari Lal, a banker, deceased, carrying on business at Muzaffarpur in Behar. In January, 1920 Girdhari Lal began to act as banker to the Mesh Chapra Indigo Factory in Tirhoot. In the accounts it is called Indigo Concern. At that time Brig was the proprietor and Manager of the factory, having an absolute right to a half share in it, and being the

11. (1856) 24, L.J. Q.B., 327.

12. 26 Calcutta, 701 P.C.

lessee of the remaining half shares. The respondent, Mr. Marshall was the brother-in-law of Mr. Brig and he held a mortgage of the half share of which Mr. Brig was the owner. From 7th January, 1890 to the 31st October, 1891, Girdhari Lal, who for the sake of convenience will be referred to as the Bank supplied funds for carrying on the factory upon Tankhas (orders) drawn by the manager on the Bank. The concern was financed by Messrs. Gisborne and Company, Calcutta. Mr. Brig used to draw hundis upon them and these were made over to the Bank, which obtained the proceeds of them and credited them in the account with the concern. Monthly accounts of receipts and disbursements used to be sent by the Bank of the Indigo Factory in duplicate. One of these used to be signed by the gomasther of the Bank, this used to be retained by the factory, and the other sent without any signature used to be signed by the Manager and sent back to the Bank. Evidence, in the case disclosed that reliance was first placed on the accounts of February, 1890 and was headed "Jumma Kumet account of money of the Meat Chapra Concern, per gunnah Bisara as per tankhas signed by Mr. Brig manager and proprietor of the said concern through the Banking firm of Babus Jit Mal and Girdhari Lal Mahajans of Muzaffarpur."

A balance of Rs. 11,395-12-6 due from the concern to the Bank appeared from the aforesaid account. At the end of the accounts a statement was made by Mr. Brig that it was correct. The accounts continued to be headed and attested by Mr. Brig in the way upto and including that for December, 1890. There was a change in the accounts of January, February and March,

1891 only to the extent that Mr. Brig was called Manager, his name appearing in the accounts, which were attested by him down and including October 1891. In 1890 Mr. Marshall purchased the interest of Mr. Brig in the factory who till then managed it on his account, and continued to manage it on behalf of the new proprietor from the 1st November, 1890, when the Indigo season 1890-91 commenced till March, 1891 when he left. The plaintiffs firm, after the transfer, continued to supply cash for the management upon the Manager's order. From time to time in payment of advances hundis were drawn by him on a Calcutta firm referred to above, which financed the Indigo concern, and were handed over by him to the Bank. On these facts, the Privy Council observed that :-

"It was admitted that the Mussif-Gomasther who conducted the business of the Bank, acted in good faith. He might honestly and reasonably have believed from the previous transactions that Rs. 25,000/- were contended to be applied in the same manner as the payments had been applied in the previous accounts. The course of his business was rather between the Bank and Indigo factory than between it and the actual proprietor. It was not proved that the Bank had any intimation of the change of the proprietorship, except what appeared in the heading of the accounts. Nor was there any evidence of the terms of the agreement under which Marshall became the proprietor. There may have been, probably was, some notice of the debts or liabilities of the concern. Their Lordships cannot agree with the High Court when they say that the burden was on the plaintiff

to prove this agreement by obtaining discovery and inspection of documents. If Mr. Brig was careless, as he said in his evidence he was, in signing the accounts as correct and Mr. Marshall was negligent in not examining the accounts, copies of which were at the factory, the loss ought not to fall on the Bank. Having regard to the nature of the transactions between the Bank and the Indigo Factory, and to the only information which the Bank had of the change of proprietorship (Mr. Brig continuing to be Manager) their Lordships think the Munsif Gomasther might reasonably suppose that Mr. Brig had authority, and that in the honest belief of that fact he continued to make the advances. They will humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to the High Court, with costs and to affirm the decree of the first Court. The respondent will pay the costs of the appeal."

The principle deducible from the above case is that if the contracting party had been made into an honest belief in the exercise of the authority to the extent apparent to him, he will certainly have a remedy against a principal. This case, no doubt, furnishes an excellent illustration of an apparent authority, though the case does not throw any light on the question of the requirements of an apparent authority nor is there any discussion whether the Privy Council thought that estoppel or some other source of authority was the basis of conferring a right in the third party to proceed against the principal.

The meaning and scope of the word 'Apparent authority' has not, unfortunately received the attention of the Judges of any High Court in India. This attitude of callous indifference on the part of the Indian Judges is not surprising as the term had been a subject of controversy amongst judges and distinguished writers of England and America. The precise meaning and scope of 'Apparent authority' is not yet settled inspite of rich foreign material available on the subject. A critical examination of the conflicting opinion, available in foreign writings would, it is trusted, conduce clear thinking.

There are several different views which explain the basis of apparent authority.

First, the theory of agency by estoppel. The factual circumstances under which it is applicable, require the following conditions to be satisfied : (i) Where the principal has made a representation by conduct or words; (ii) that A has authority to act as his agent; (iii) to a third party T; (iv) calculated to deceive T (v) and in fact relied upon by T.

Though it is undoubtedly correct to state that the factual position in cases of apparent authority are similar to those created by estoppel, yet there are certain differences which must be noted. Deception and change of position of the third party are the key note of estoppel whereas these elements are not necessary in all cases of apparent authority.

As Prof. Warren Seavey rightly points out estoppel is essentially, a tort theory based upon a misrepresentation of

of facts which causes harm to another. There are several points of criticism of the estoppel theory. Prof. Powell's arguments against estoppel as the basis of apparent authority may be noted :- (i) it does not create the relation of principal and agent, it merely affects the relation of principal and third party by preventing the principal from denying that he is liable for the acts of the agent.

(ii) the doctrine of apparent authority was established before the courts used the language of estoppel though this contention is not conclusive.

(iii) the doctrine of estoppel does not explain why the principal can also sue the third party though it explains how and why the third party can sue the principal.

Though the doctrine of agency by estoppel has been severely criticized we also find ample support for it in several court decisions.

Second: The American Re-statement of Agency¹³ (second) presents another theory, which states that apparent authority applies to cases in which the principal has done something which has caused, a third person to believe that the agent has authority to do a specific act or series of acts and the third person deals with the agent with reference to the appearance for which the principal is responsible. The merits and defects of this theory will be discussed later on.

Third : According to some authorities the basis of apparent authority may be a course of dealing or custom or usage of the trade.

The author, however, is of the view that it is better to regard the term "apparent" only where the agent in fact has no authority but appears to third party to have authority because the principal has made a representation either expressly or impliedly to that third party. Apparent authority, therefore, is no authority at all. It depends really on a representation by the principal to the third party. Ewart¹⁴ states that the principal's liability depends "upon the ground of appearance, i.e. upon the grounds of estoppel."

In *Rama Corporation Ltd. v. Proved Tin General Investments Ltd.*¹⁵; Slade J; said that : "Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel." There is on the other hand the conflicting opinion of Devlin J. in a well known case¹⁶ where he has stated that the doctrine of apparent authority is not based on estoppel.

The theory stated in the Restatement of Agency regarding the basis of apparent authority is indeed correct and is supported by many court decisions. The only defect appears to be that the nets are cast too wide so as to include course of dealing, custom or usage of trade also as the basis of it, and thus provides, other sources of implication as well within the scope of apparent

14. 16 Harv. Law Review 186

15. (1952) 2 Q.B. 147.

16. *Eastern Distributors v. Goldring*. (1957) 2 Q.B. 600.

authority.

In an Ohio case¹⁷, the facts were as follows :- The defendant ran a hotel in Cleveland - obviously a small and unimportant place, and when the plaintiff arrived late in the night, a man in the lobby "who appeared to be in charge" went behind the counter, registered plaintiff, and took jewels and cash from plaintiff to be put in the safe, giving him a receipt thereof, signed in defendant's name. In the morning it was discovered that the man "who appeared to be in charge" was an impostor and had decamped with the jewels and cash. On an action by the plaintiff the defendant set up the defence that the person who posed as her agent was not so in fact and that he had no authority to accept and keep for safe custody jewels or cash on her behalf. It was accordingly argued on her behalf that she was not liable. The court, however, held that defendant "by her voluntary act or by her negligence, had placed some one in a position where it would appear to any one coming in to become a guest at the hotel that he was properly in charge, and that therefore she had made herself by her conduct responsible for his acts." The agency, the court said further, "is created by estoppel." A similar case in point is a Missouri case¹⁸, in which an impostor in defendant's transfer office received plaintiff's trunk check, which was never recovered or traced out. Both these cases furnish examples of estoppel as being the basis of apparent authority. The author however, has this comment to offer that estoppel should be regarded as a distinct source of application of authority and that these cases should not be regarded as based on apparent authority.

In many cases it is held that where principal puts any person into a position where certain powers are normally expected to be exercised, the principal will be bound by the exercise of those powers even if the one in question has been specifically withheld.

In a Pennsylvania case¹⁹, Bush v. Atlas Automobile Finance Corporation - the facts were that the manager of the Auto Finance Corporation made an arrangement with a buyer who was in arrears, whereby the company retook the car but agreed to return it later, on full payment. On these facts the Court held that the manager had at least apparent authority to make such an arrangement. It cannot, however, be denied that there are limits to the apparent authority even of a general manager.

Cases where the agent alone knows whether what he is doing is in fact within his authority have posed problems. It is well known that the freight agent of a rail road has authority to issue bills of lading for goods received for shipment, and only for goods so received. Normally the agent alone will be in a position to know whether or not the bill represented a real or a fictitious carload of grain. Any person who tries to find out from higher appeals of the road if the bill were genuine could only be directed to find out from the agent concerned. To take another familiar example, if a local manager is authorized to buy goods on credit only upto a certain amount and a potential seller, knowing this, were to inquire whether the limit

19. (1937) 129 Pa. Super. 459.

had been reached, in the majority of cases, recourse to the local manager would be necessary, since such other possible alternatives as are credit of the books would be too slow for the needs of Commerce.

Again, there may be a case where an act externally within the course of authority may not be so if done by the agent not for the benefit of the principal but for his personal gain. Suppose an agent authorised to write guarantee policies writes one but the secret motive is of supporting the credit of a doubtful concern in which he is personally interested, clearly not with the least idea of benefitting his principal's business. If we assume in such a case that the act is unauthorised in fact, it is certainly not within the agent's apparent authority.

It must be kept in mind that in all these cases discussed above, there is no apparent authority. In the cases at hand the principal has made no misrepresentation and, therefore, cannot be held in any way responsible. In spite of all these legal difficulties our instinct is likely to suggest that the principal should be held responsible. The situation calls for a sympathetic consideration of the awkward position in which the third party is placed, and accordingly a feeling arises that his grievances should be redressed.

In the first and third of these above mentioned cases the law today agrees with our sentiment. In the bill of lading cases in which the principal was once held non-liable by

authoritative decisions of the Courts, both in England²⁰ and America²¹; his liability is now clearly established, at least in America, both by statute and decision²². The English law appears uncertain.

In the case of the agent externally acting within his authority, but with an improper motive, a leading English case²³ establishes the principal's liability and while American authority is meagre, it would seem to favour the same view.²⁴

In the American Restatement of Agency, Section 140, it is said that Principal is bound where Agent was authorized, was apparently authorized or "had a power arising from the agency relationship and not depending upon authority or apparent authority." It is now common to say, agreeing with the view expressed in the Re-statement that principal is bound in cases of the type we have been discussing because the Agent had an "Agency Power."

It appears desirable to examine the extent of authority of the agent of an undisclosed principal. In Watteau v. Fenwick²⁵

20. Grant Versus Norway (1851) 10 C.B. 665=16.L.T.(O.S.) 504

21. Baltimore & Ohio Rly. v. Wilkens (1876) 44 Md. 11.

22. Gleason versus Seaboard Air Line Railway Co.(1929) 278, U.S. 349.

23. Hambro v. Burnand (1904) 2 K.B.10 noted in 17 Harv. L.Rev. 56 and 50 L.Q.Rev. 224, 228.

24. Macklin v. Macklin (1944) 315 Mass. 451.

25. (1893) L.Q.B. 346 noted in 10 Cal. L.Rev. 763, 7 Haw. L. Rev. 49 and 9 L.Q.R. III.

the facts were that the defendant bought a beer house but retained the prior owner as manager, no notice of the change in ownership being given and the prior owner's name remaining painted over the door. The Manager was authorised to buy nothing but bottled ales and mineral water. He bought cigars and other things on credit on various occasions, and for these acts of the manager, the owner was held liable. It was argued in the case that there could be no apparent authority in the manager, but Willis, J., said" . . . Once it is established that defendant was the real principal, the ordinary doctrine as to principal and agent applies - that the principal is liable for all the acts of the agent, which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority."

There are certain cases²⁶, contrary to this, and it has also been criticized by some commentators²⁷, but there is no doubt that it represents the law in England and the prevailing view in America²⁸.

The inference that such "implied authority" is given to the agent is drawn from such circumstances as the nature of the agency and the type of business to be transacted.

26. (1919) D.L.R., 383.

27. 23 Harv. L. Rev. 513 (F.R. Mechem); Seavey. 29 Yale. L.J. 859, 879-881, 599-601. Studies in Agency 90-91; by Goodhart and Hanson; by Montrose 17 Can. B. Rev. 693.

28. Brooks v. Shaw (1908) 197 Mass. 376.

"Apparent authority" according to Bowstead in his Law of Agency is a Phrase wide enough to include the following :-

(i) Where authority of an agent has been expressly excluded by private instructions of the principal, but the third party being ignorant of the limitations, is entitled to assume that the agent has authority. In such a case, it is the appearance of the authority that does not in fact exist that in this situation regulates the relationship between principal and third party, and accordingly the phrases "apparent authority" and "apparent scope of authority" are used in contrast to "actual authority", in chapter 8, Section 1 of (Bowstead - Law of Agency), which considers the extent to which a principal is bound by his agent's acts.

(ii) The authority apparently conferred by an instrument, the principal having by private instructions excluded or limited such authority.

(iii) The authority with which a person appears to be invested who is held out by another as having authority when in fact he has no actual authority or no authority from which the represented authority could be inferred.

An explanation of these three different categories is furnished by an examination of the scope of Article 80, Section 1, Chapter 8 of Bowstead's Law of Agency :-

"Every act done by an agent professedly on the principal's behalf and within the scope of his actual authority, is binding

on the principal, with respect to persons dealing with the agent in good faith, even if the act be done fraudulently in furtherance of the agent's own interests, and not in the interests of the principal.

Every act done by the agent within the apparent scope of his authority binds the principal, unless the person dealing with the agent has notice that in doing such act the agent is exceeding his authority."

Certain conclusions can be drawn from the above article. They may be stated thus :- (i) A third person ignorant of any limitations upon the agent's authority privately imposed by the principal, the agent will appear to have the authority which would be implied from the circumstances of the agency. (ii) Where a third party has notice of the contents of a document emanating from the principal, which properly construed gives an appearance that the agent has a certain authority, acts of the agent within the scope of the apparent authority will bind the principal, notwithstanding that the principal may privately have given instructions to the agent limiting or excluding the authority so apparently conferred.

In certain cases an undisclosed principal is bound by acts of his agent beyond the scope of the agent's actual authority, but such cases, it is submitted, cannot strictly be upon the basis of an apparent authority. The reasons are obvious for the agent appears to the person dealing with him to be himself a principal, and there is no appearance of any authority to bind another.

Much doubt exists on this problem and judicial authorities are mongre. The controversy however is largely concerned regarding three different cases which will now be discussed.

Edmund v. Bushell²⁹ is an important case in point. The facts of the case may be briefly stated thus :-

A owned a business which was carried in the name of B with B as Manager. B appeared to be the principal. It was incidental in the ordinary conduct of such business to draw and accept bills of exchange. A forbade B to draw or accept bills of exchange. B accepted a bill in the name in which the business was carried on. It was held in this case that A was liable on the bill. The second case in point is Watteau v. Fenwick³⁰, which has already been discussed on an earlier page.

The third case in point is Kinahan v. Parry³¹. The facts of the case may be briefly stated as follows :-

A appointed B as the manager of a hotel owned by A, and the licence was taken out in the name of B, who appeared to be the principal. A told B to order spirits from a certain brewery only, but B disregarded this instruction and ordered whisky from C. It was held by the Court that A was liable to C for the price.

29. (1865) L.R.I.Q.B. 97.

30. (1893) I.Q.B. 346, Dev. et.

31. Restatement, Agency Art. 7 (1932). - (1910) 2 K.B. 389 D.W.C. reversed by C.A. (1911) 1 K.B. 459 on another ground.

It may be respectfully submitted that the act of B, as manager, cannot be regarded to fall within his apparent authority, as the manager of a hotel, who is known as a manager only, to buy spirits from anybody he chooses.

In discussing the subject of "apparent authority" a question which naturally arises is what features distinguish 'real' from apparent authority. In case a principal communicates his assent expressly or implied to the agent, the authority is real, but in case the principal notifies his assent to a third party, the authority is apparent³². The expression "apparent authority" was first introduced by Lord Ellenborough in Pickering versus Busk³³ and the expression gained currency during the 19th Century. The expression "apparent authority" has a more practical utility too. To explain this, suppose that T is about to contract with A, who claims to be acting for and to have full authority from P. What is T to do in this situation? He has three and only three alternatives. In the first place he may refuse to deal with A until he has consulted P. This would, needless to say, be the safest thing to do; and indeed, long^{ago} Boreford, C.J., told a disappointed third party, never to be wise after the event. Though, it is undoubtedly the best course to adopt, the precaution of first communicating with P would make a law of agency quite redundant, since T would be contracting with P rather than with A. In the second place, T may deal with A on the understanding that whatever happens, he will have an action against A personally.

32. (1812) 15 East. 38, 39. - *Restatement, Agency, Art 7 (1932)*

33. (1812) 15 East. 38.

The broad answer is that ^A must appear to have the authority to act as he does; or putting this more correctly A's authority must be presumed or inferable by T in the given circumstances in which A and T find themselves. The circumstances are mainly of four kinds :- (i) A's authority may be inferred from his position or the tasks he performs or (ii) the authority is inferable from a definite course of dealing between A and T or, (iii) the authority is inferable from A's actual possession of the thing to be sold and (iv) an authority may be inferred from A's written authorisation, the terms of which may well appear broader than P meant to be.

It is suggested that it will be desirable in the interest of clarity that the different sources of an agent's authority are so evolved as not to overlap each other. With this dominant idea in view it would be better if "apparent authority" is not mixed up with a course of dealing, estoppel or holding out.

Having examined the different views presented by Jurists regarding the nature of "apparent authority", and bearing in mind that it is desirable that the different sources of implication be kept entirely separate, it appears to the author that the scope of apparent authority after eliminating course of dealing, estoppel, holding out or custom or usage of trade as the basis of such authority, the only real cases which appear to be covered by apparent authority are where the principal has permitted or caused an agent to acquire a reputation of having authority to do certain kind of things which reputation may be

created by the authority usually confided in such agents or conferred by a power of attorney, but later on is withdrawn by the principal without notifying to the third party. Where such a position exists, it is obvious that the agent really has no authority but the third party is entitled under the law to assume that he still has authority. Such cases would genuinely be regarded as cases of apparent authority. Another class of cases which may also be included within the scope of apparent authority are where a mercantile agent with the permission of the principal has the possession of goods or property or documents of title and he then has apparent authority to transfer them for value to a bonafide purchaser without notice of the defect of title in the mercantile agent. This law is contained in Section 27, the Indian Sales of Goods Act, as also in Sec. of the English Sales of Goods Act. The author, therefore, recommends that either under Section 187 of the Indian Contract Act apparent authority may be mentioned as a ground of implication, and its ingredients will set out or a new Section may be added subject to the same conditions. Warren Seavey, a distinguished Jurist of America, is precisely of this opinion, with the only difference that he is inclined to include cases within the scope of apparent authority where authority by implications arise from the custom or usage of the trade. It is already submitted earlier that this view does not appeal to the author inasmuch as there will be an overlapping of two distinct sources of implication into one.

An important question arises for determination under Section 187 of the Indian Contract Act, to wit; can a wife

be regarded as an agent of her husband for incurring debts for various household necessities or for the personal expenses of her children and herself, and is she entitled to pledge the credit of her husband, on the assumption, that she has implied authority on his behalf to do so. A critical examination of some Indian cases will throw sufficient light on the subject of inquiry.

A case in point is Pusi Defendant-appellant versus Mahadeo Prasad and others³⁴, plaintiff-respondents. The facts necessary for an appreciation of the principles of law laid down may be briefly stated as follows :- Parmi, the wife of Pusi and her husband's brother jointly executed a bond on the 1st January, 1875 for the payment of moneys borrowed to pay a debt due by her husband and his brothers and hypothecated the family house as a Collateral Security for the repayment of such moneys. " The following passage from the judgment is quoted here :-

"Respondents sued not only the obligors, but also appellant, and claimed to make him liable in person and property jointly with the obligors, for the whole debt; and the lower appellate court has allowed the claim on the ground that the husband is liable for the debt contracted by the wife. This liability, however, cannot be imposed except when the wife has had express authority from the husband, or under circumstances of such pressing necessity that the authority may be implied."

34. I.L.R. 3 All. 122 (1881).

The learned Judges advanced various reasons for not holding the appellant liable. They may be stated thus; firstly the money was borrowed by the wife to pay an instalment of a debt due by the appellant and to obtain money for expenses of cultivation. In such a case obviously the question of the wife possessing an implied authority could not arise in respect of the first item and secondly regarding the money taken for cultivation, there was no evidence to show that it was in fact required for cultivation for her husband's land or that she personally received any money on that account. The loan, added their Lordships, was taken for a joint purpose of the Hindu Family and hence no implication of authority could arise in the wife to pledge her husband's credit. It was really a surprising feature of the case that the plaintiffs dealt with Parmi, the wife of the appellant, as making the disposal of the property in her own right and did not look upon the husband as in any way responsible for the debt. The learned Judges, having due regard to the circumstances of the case stated above, held that the appellant and his property were exempt from liability in lieu of the debts incurred by his wife. The only point that was considered by their Lordships was whether there was such pressing necessity as could be regarded sufficient for giving implied authority in the wife to pledge her husband's credit. This case, undoubtedly shows a very narrow approach to the question of the implied authority of a wife to pledge her husband's credit, by their Lordships of the Allahabad High Court, for implied authority may arise not merely on ground of necessity but from other sources as well, already referred to earlier.

Credit, however, can be given to the honourable Judges, who decided the case for laying down an important principle of law, though couched in a negative form that a wife can have no implied authority to pledge her husband's credit when the loan is not taken solely for her husband's benefit.

Another case of considerable importance is *Girdhari Lal v. W. Crawford*³⁵, also decided by their Lordships of the Allahabad High Court. Here, a certain W. Crawford and his wife W. Crawford had lived together ever since their marriage in 1855. The husband had always given Rs.220/- per month regularly to his wife by way of allowance to meet the household expenditure and all her own expenses. Nine or ten years prior to the filing of the suit for recovery of Rs.589-2-9 by the plaintiff, Girdhari Lal. Mrs. W. Crawford had been borrowing money in her own name by ruqqas or notes of hand from the plaintiff. The loan was taken for paying interest on old debts contracted by her. It transpires from the evidence on record that one of the loans was applied to the payment of the first debt, which was incurred for payment of medicine, during Mrs. Crawford's illness. It is also clear from evidence that Mr. Crawford knew nothing about these loans and that he never authorised his wife to borrow money. On these facts, the learned Judges laid down the following principles of law which is quoted below :-

35. I.L.R. (1887) 9 All. 147.

"The Judge has rightly held that the liability of a husband for his wife's debt depends on the principles of agency, and he can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done. In the present case, the Judge has held that there is no express or implied agency, and the circumstances under which the debts were contracted Support this view. It is not a case where agency might be applied, as for instance, of money but to a wife to meet some emergent need, but of successive borrowings over a considerable period, the debt having increased by high rate of interest. We dismiss the appeal with costs."

In order to appreciate the merits of the judgment it is necessary to consider the reasons advanced by the District Judge, for the simple reason that the learned Judges of the Allahabad High Court have referred to the opinion of the District Judge with which they are in complete agreement.

The Judgment of the District Judge of Cawnpore is quoted below :- "The husband in this case contends that he is not liable for his wife's debt. It is contended that, being a Government servant, his family could have got medical advice without paying for it, and that Mrs. Crawford was not justified in borrowing without her husband's knowledge to pay off previous debts. I think the transactions are merely simple loan transactions, and no implied agency on the part of the wife can be proved in this case. It is not shown that plaintiff looked to the husband's credit, or that the husband ever paid his wife's debts for her on any previous occasion. It does not appear

that Mr. Crawford was to be called on to execute the bond in favour of plaintiff. I, therefore, dismiss the appeal of Mrs. Crawford and accept the appeal of Mr. Crawford and find him not liable for this debt."

The Court's finding that no agency was established between Mr. Crawford and Mrs. Crawford, appears to have been based on the following reasons :- Firstly, that the husband never authorized his wife expressly to take loan; secondly the husband never paid any of the debts contracted by his wife; thirdly, that there was no necessity to take loan for medicine as this expense would have been borne by Government; and fourthly, the wife never informed her husband as to her taking loan; and fifthly, the plaintiff never advanced any loan to Mrs. Crawford considering her to be agent of her husband, and that he had no reason to believe that she was acting in that capacity. The various reasons advanced by the learned District Judge, Cawnpore, leave no room for doubt that the wife could not be regarded as an agent of her husband for the purpose of pledging the credit of her husband.

The wife, under the circumstances of the case could neither rely on incidental nor apparent authority, nor a course of dealing nor estoppel, nor ratification, nor custom or usage of the trade for playing the role of an agent for her husband. The judgment delivered by the learned Judges of the Allahabad High Court cannot, therefore, be assailed on any ground, but it is unfortunate that the opinion does not discuss the grounds on

which authority might have been implied in favour of a wife to pledge the credit of her husband for her debts. Nevertheless the judgment is significant as indicating the circumstances in which it cannot be so implied.

A case in point is (firm) Baboo Lal-Bhagwan Das, plaintiff-appellant versus M. Purcell and others, defendant-opposite parties³⁶, in which his Lordship Justice Niamatullah stated :- "The learned Judge of the Court below does not appear to have appreciated the points which were in controversy between the parties," as between the plaintiff and Mr. Purcell several questions of law and facts arise. If the sum acknowledged to be due to the plaintiff by Mrs. Purcell on 2nd June, 1934 represented the price of household necessities which were intended for the family. Consisting of Mr. and Mrs. Purcell, and if they can be considered to be necessary for persons in the position of life occupied by the defendants, the Court may well infer that the wife had authority to bind the husband." But as there was not enough evidence to judge the case on its merits, the learned Judge remanded it to the lower Court to determine (1) whether the sum of Rs. 600/- referred to in the document dated 2nd June, 1934, was due to the plaintiff in respect of necessities suited to the style of living of Mr. and Mrs. Purcell; (2) Whether Mr. and Mrs. Purcell lived together as husband and wife, and the latter managed the household affairs; and (3) Whether under all the circumstances appearing in evidence, it is reasonable to infer

36. A.I.R. 1936 Allahabad, 869.

that Mrs. Purcell had express or implied authority to pledge the credit of her husband for necessaries of life suited to their style of living.

Though the case was not finally disposed of (by the learned Judge of the Allahabad High Court) it is possible to read into the order (passed by him), certain important principles that must be borne in mind while deciding a case of an implied authority of a wife as an agent of her husband. Those principles are that it is necessary to find out from the facts of a case whether the relationship of husband and wife exists in fact, whether the wife is managing the household affairs and further whether the articles purchased by the wife are necessaries according to their station in life. If all these questions can be answered in the affirmative the Court can decide in favour of the wife as being possessed of an implied authority to pledge the credit of her husband for her debts.

Another instructive case in point is Kanshi Ram, plaintiff-petitioner v. B. Nisbett Shedman and another, defendant-respondents³⁷, decided by his Lordship Justice Jai Lal of the Lahore High Court. The principle of law laid down by him may be reproduced in his own words as follows :- "The law on the subject appears to be this, ordinarily the husband is not liable for any debts incurred by his wife merely by virtue of the relationship of husband and wife, but if the wife is managing the household of the husband, then she is to that extent his

37. A.I.R. 1929, Lahore 18.

agent, and binds him for any liability incurred by her in managing the household. If, however, articles of necessity are supplied to the wife then to that extent the husband is liable because of his legal duty to maintain his wife and the consequent implied agency of the wife to pledge the credit of her husband. If the husband and wife are living separately by mutual consent and the wife has no other means of subsistence, then husband can claim to be absolved from liability by proving *inter alia* that under the terms of the separation he had agreed to make her an allowance and that such allowance has been paid by him, otherwise his normal liability to maintain his wife continues."

The judgment delivered by his Lordship Justice Jai Lal of the Lahore High Court, undoubtedly represents the correct law, but it is unfortunate that it does not throw any light on the meaning and scope of the term 'Necessaries' and an explanation of the term would have been of the utmost importance to litigants and Judges alike in future law suits. The English Law on the subject is to the same effect. Bowstead in his Law of Agency has stated that where a husband and wife live together, the mere fact of cohabitation raises a presumption that she has authority to pledge his credit for necessities suitable to the style in which they live. Bowstead is supported in his view by the decision in the case *Paquin v. Beauclark*³⁸.

38. (1906) A.C. 148.

This view is also supported by the principles laid down in another English case *Biberfeld versus Bernas*³⁹, where it was laid down that if the wife had means of her own sufficiently ample to provide for her own private necessities, she had probably no implied authority to pledge her husband's credit for such necessities, as distinct from household necessities. An illuminating case in point is *Dr. Kanhayalal Bisandayal Bhiwapurkar, plaintiff-appellant versus Indarchandji Hanirmalji Sisodia and others - defendants-Non-applicants*⁴⁰, the facts of the case may be briefly noted as follows :-

The case of the plaintiff, an eye specialist was that Laxmibai, a Hindu woman, consulted, and requested him to get the ^{Cataract} contract in her eye removed and entered into an agreement to pay the operation and incidental charges. The plaintiff performed the operation and filed a suit for the recovery of his aforesaid charges against the husband of his patient. The evidence on record showed that the plaintiff directly settled his fees with his patient in her personal capacity and not as an agent of her husband. It was also proved by evidence that Laxmibai was not completely cured of her ailment. The question that arose for determination in this case was whether the defendant, husband of Laxmibai could be held liable for the liabilities of his wife, under the circumstances mentioned above. In other words, his Lordship Justice Niyogi of the Nagpur High Court was called upon to decide whether Laxmibai could legally make her husband liable according to Sections 68, 70 and 187

39. (1952) 2 Q.B. 770 C.A.

40. A.I.R. (34) 1947 Nagpur, 84.

of the Indian Contract Act. Replying on some earlier decided cases, citations are mentioned as under (i) 3 All. 122, (ii) A.I.R., 1929 Lahore and (iii) A.I.R. 1933 Madras 686, his Lordship laid down the following principles of law which are being quoted :-

"In India, the capacity of a woman to contract is not affected by her marriage, either under the Hindu or the Muhamadan Law. There is no disability attached to a Hindu female; married or unmarried to preclude her from entering into a contract either on the ground of sex or coverture. In terms of S. 187, Contract Act, an Indian woman, when she enters into a contract with the consent or authority of her husband, is treated as his agent and her act is made binding on her husband and in certain circumstances the law empowers her even without his authority, to bind her husband's credit . . . otherwise a married woman cannot bind her husband without his authority but she may be liable on her Contract to the extent of her stridhan property: See I Bom. 121. The person who deals with a married woman must plead and prove in what capacity she purported to enter into Contract with him as an agent for her husband or as a principal on her own account." The plaintiff had contended that in view of Sections 68 and 70 of the Indian Contract Act, the husband was liable for the debt contracted by his wife. This plea was answered in the negative by the learned judge in these words :- "Indeed Sec. 68 deals with the supply of necessaries but that is in respect of a person incapable of entering into a Contract or "any one whom he is legally

bound to support i.e. the dependent of a person incompetent to contract. Indarchandji was not incompetent to contract, and the section is inapplicable to him. As to Sec. 70, it must be observed that this section cannot be availed of by a person who relied on an express contract as the plaintiff alleged to have entered into with Mt. Laxmibai in the case. 'The husband never entered into the picture when the plaintiff settled the terms with her. Nor is there anything to show how the husband received any benefit. It is only actual benefit which will furnish a ground of action. If the wife had been cured of her ailment completely, perhaps that circumstances might be material, but there is no evidence on the point. For the foregoing reasons I hold that Indrachandji is not liable.

The judgment delivered in the above case, though well reasoned, and supported by Indian and English authorities, fails to take into consideration sec. 233 of the Indian Contract Act, 1872. Section 233 is here reproduced :- "In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable". The section has been interpreted differently by different judges of the Madras High Court. Conlts- Trotter C.J., in Kutti Krishnan Nai v. Appa Nair⁴¹, held that though the wording of Section 233 of the Indian Contract Act, 1872, was very unfortunate, it was intended to reproduce the English Law. The relevant portion of the judgment may be stated thus :- "I have come to the conclusion that what the section means is that the

41. A.I.R. 1926 Madras, 1213.

person dealing with the person through the agent may at his election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; but I am quite clear on the point that the section can only be construed as meaning that he may sue both principal and agent in the alternative, and that he cannot get judgment against both of them jointly for the amount sued for. That would be to turn a liability which is clearly mutually exclusive into a joint liability." A Division Bench in Madras⁴² have dissented from Conlts-Trother C.J. in the case discussed above: Leach C.J., observing: "There is no ambiguity in the language used in the Section, and I am unable to see anything unreasonable in the rule, which it embodies . . ."

In an earlier Bombay case *Shivlal Motilal v. Birdichand*⁴³, it was held that the Section created a joint liability. In the light of these judicial pronouncements, and also looking to the plain meaning of the language of Section 233, it is difficult to give it a meaning other than that which commended itself to Leach C.J. and his brother Judge in Madras.

The learned Judge of the Nagpur High Court stated in his judgment that the plaintiff not having proved that Laxmibai entered into a contract with him as the agent of her husband could not make him liable. For the reasons stated above, it is respectfully submitted that the decision is erroneous.

42. A.I.R. 1939, Mackus, 520 (*Shamsuddin Ravuthar versus Shaw Wallace & Co.*).

43. (1917) Bom. L.R. 370; 40 I.C. 194.

Before concluding the discussion of Section 187 of the Indian Contract Act, 1872 it is necessary to consider the extent and nature of legal development in India relating to the implied authority of an agent. The scheme of the Indian Contract Act appears to be to include within Section 187, all cases of implied authority originating in a course of dealing, apparent authority or for the matter of fact, flowing from any other source by which authority may be implied in an agent. Broadly speaking, Sections 188 and 189 deal with incidental authority and authority in an emergency respectively. Sections 190 to 195 deal with the circumstances under which an agent has implied authority to appoint a sub-agent. Section 1 leaves custom and usage of the trade to the realm of Judicial decision and so is Section 211, which indirectly makes custom or usage of the trade as a source of implication of authority. It follows, therefore, from this broad classification that though the power of a court is comparatively unfettered and unlimited under Section 187, inasmuch as the language of the Section . . . "Circumstances of the case" undoubtedly confers a wide discretion on a court to bring within the scope of it all cases of implied authority, but in view of the broad classification of the implied authority of an agent, we find that courts have decided cases only under course of dealing and apparent authority, though not shutting its door for consideration of cases arising out of estoppel. Legal development in any branch of law has never been uniform, it has usually adopted a circuitous and zig zag path. As

Justice Holmes⁴⁴ puts it "The life of the law has not been logic but experience." The history of English common law is replete with such instances. Legal development of the branch of law, which is being here investigated, does not show any signs of development. Unfortunately, our Indian Judges have never taken the trouble of indicating precisely the main ground of their decision, and have taken shelter behind an expression of wide import "circumstances of the case." To take an example for the purpose of illustration, the case Manter Baksh Singh versus Bhawani Singh and others⁴⁵ may be cited. In that case, though there was a clear course of dealing empowering the agent to bind his principal by his acts, one fails to understand why the court did not state how far in deciding the case they relied on a course of dealing, and how far on the 'circumstances of the case', curious enough, the learned Judges of the Oudh Chief Court do not anywhere indicate in the body of the judgment as to what were the 'circumstances of the case' which persuaded them to take that view of the case. Other decided cases on Section 187 disclose the same lack of approach with the inevitable consequences that an advocate is at a loss to understand the trend of the discussions. A client having a case based on Section 187, cannot have the benefit of correct legal advice; for a poor Indian advocate has no materials on which to give his advice. One essential function of Judicial interpretation of Law is that precedents will be a source of authority for future litigation, but alas, there is none in

44. Holmes - Common Law.

45. A.I.R. 1917, Oudh 237.

India pertaining to Section 187. The learned Judges have not only completely ignored to offer an explanation of the terms 'course of dealing' and 'apparent authority', but have never tried to indicate how far one of the sources of implied authority occurring in a given case was sufficient in itself, to warrant their conclusions. While it is not intended to introduce the debatable question of choice between the merits and otherwise of 'flexibility' and 'certainty' in law, that question properly belonging to jurisprudence: a broad approach to that question may be found profitable.

If a law is flexible, one can easily introduce the principles of equity. In describing the merit of flexibility in law, one may be in agreement with Lord Sumner in Baylas versus Bishop of London⁴⁶ state that :- "Whatever may have been the case, a hundred and forty six years ago, we are now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled Justice as between man and man". 'Certainly' in law is a virtue which must always be prized by all litigants, and the law merchants in particular. It is not too utopian a hope that our Indian Judges will rise equal to the occasion and maintain both the merit of certainty and flexibility, which the language of Section 187 is capable of, on a proper interpretation. Hard and controversial cases can easily be disposed of by the courts because of the wide import of the term 'circumstances of the case'. Certainty in the law can be guaranteed if the learned Judges of our Indian High Courts, the

46. (1913) I Ch. 127.

Supreme Court of India make it a point to elaborate the idea of a course of dealing, and apparent authority and state specifically, to what extent they have been influenced in their decision on the basis of a particular source of implied authority.

These suggestions are humbly offered for the kind perusal of our Judges and it is hoped that in the interest of proper legal development they will give it a due and proper consideration.

CHAPTER IIINCIDENTAL AUTHORITY OF AN AGENT

In the law of agency, certain problems are predominant, The major problems are how a business can be run smoothly and at the same time to balance the interest of the principal, the agent and the third party who comes into contractual relationship with the principal through the agent. Certain amount of authority the law must necessarily concede in favour of an agent before he can properly run the business. The third party should have adequate assurance that he is treading on safe ground in contracting with the agent. This hypothesis gives rise to the recognition of incidental authority. Broadly speaking, incidental authority signifies that an agent has power to do acts which are usual and necessary for carrying on that particular class of business. The third party in dealing with the agent has then a right to presume that the agent possesses the necessary authority and so he can contract with him with impunity. Agency is essentially a commercial relation. The third party has neither time nor opportunity to find out the extent of authority of the agent which he has received from his principal in an individual case, the authority thus has to be classified and taken at a face value.

The general agent as distinguished from a special agent, must be deemed to possess some usual authority without hindering

conditions. The principal knows or is atleast expected to know when he appoints an agent for transacting business his vouchers will not be carefully examined. The principal ordinarily knows or should know that the agent will not usually mention a lack of authority, for business, otherwise will be placed in jeopardy. A faithful and honest agent may at times be tempted to overstep his authority in the desire to transact his business successfully. It may be argued that if the third party has any doubts regarding the agents' lack of authority he need not deal with such a agent but if business is to continue, such an argument has no place and must be discarded. The object of the law is to solve difficulties and adjust relations, both in social and commercial life.

The recognition of incidental authority in an agent is necessary in the interest of business and the policy of the law in giving recognition to it is the expansion and smooth running of business. Examining the question from the practical or business point of view, we find that the third party in dealing with an agent looks to his ostensible and not his actual authority. As such if the agent has no such authority but derives it every time from his principal, the third party has no common meeting ground. This would certainly paralyse business transactions. The principal stands to lose nothing by the recognition of incidental authority in his agent as he can always withdraw it by notifying it to the third party. In short, without abrogating the principal's right of modifying the authority of his agent, law has devised an excellent method of tackling the

business problem of adjusting the authority of principal, agent and the third party.

The policy of the law thus is guided by business convenience for without it the wheels of commerce would not go round.

Section 188 of the Indian Contract Act, 1872, broadly contains the law relating to the 'incidental authority' of an agent to bind his principal. The word 'incidental authority' does not occur in the section. The only way to show that the section deals with such authority will depend upon the extent of its similarity with the meaning assigned to this term in the Agency Law of England and America or for the matter of fact in the Agency Law of any other foreign jurisdiction.

According to English Law incidental authority "necessarily includes medium powers, which are not expressed. By medium powers, I mean all the means necessary to be used, in order to attain the accomplishment of the object of the principal power."¹ Stoljer in his Law of Agency states very correctly that incidental authority poses, certain new questions. One of these questions is whether an agent has a right to sign a contract for the principal. This question often arises when an agent is appointed 'to procure a purchaser' or 'negotiate a sale' of land belonging to the principal. English authorities lay down the rule that unless specifically authorised

1. Howard v. Baillie, (1786) 2 H.Bl. 618, 619 per Eyre, C.J.

an agent does not possess the necessary power to sign a contract of sale. But supposing P were to authorize A to sell his property for a fixed price. In such a case A must be deemed to possess authority to sign a contract of sale, for a sale generally means a sale effectual in law which further implies that, if necessary, the contract must be written and signed². The authority of the agent A to sign a contract is an incidental by-product of his main authority. Story in his Law of Agency has clearly stated that express authority conferred in writing or verbally "it is, unless the contrary manifestly appears to be the intent of the party, always construed to include all the necessary and usual means of executing it with effect".³

According to American Law 'incidental authority' simply means authority to do things which are normally necessary to the act or status conferred by an express authority. Suppose P appoints an agent A to manage his business. What does it signify? It means simply this that A has incidental authority by virtue of being a manager to do all things that are usual and necessary for carrying on that business efficiently. Unless otherwise expressly prohibited, the manager, will have power to hire and discharge employees, buy and sell stock in trade and the like but not authority to borrow money or give negotiable paper.⁴

2. *Rosenbaum v. Balson*, L.R. (1900) 2 Ch. 267, 269.

3. *Story's Law of Agency*, Art. 58, page 49.

4. *Coener v. Davis*, (1941) 112 Mont. 605.

It is not proposed to examine in detail, at this stage the English and American Law bearing on the 'incidental authority' of an agent unless the Indian Law on the subject has been critically and elaborately examined.

A question of considerable importance arising under section 188 of the Indian Contract Act, 1872, is under what circumstances can a Court regard an estate or house agent to be empowered to sell his principal's estate or house ? Such a question has necessarily to be answered after construing the language of the authority conferred on an estate agent. This question can be examined under three broad categories :-

(i) Where the principal authorises the agent to find a suitable purchaser and negotiate a sale, (ii) Where the principal authorises the agent to oblige him by entering into a contract of sale on his behalf, and (iii) Where the principal authorises the agent to accomplish an actual conveyance of the property. In the discussion of the above categories, a question though of secondary importance arises and will be discussed after the main question. Under what circumstances is an agent entitled to receive commission ? A critical examination of the Indian cases available on this subject is herein attempted.

A leading case on the subject is *Abdulla Ahmed v. Animendra Kissen Mittar*⁵. In this case the main questions that arose for consideration were~~x~~ two :

Firstly whether the appellant who was an estate broker was

5. (1950) S.C.J. 153: (1950) S.C.R. 30.

authorized by the respondent to enter into a contract with a third party to sell (his principal's) house.

Secondly, whether the appellant was entitled to commission if so what was the amount of it ?

In order to appreciate the differing views of the majority of the learned Judges on the one hand and of Justice Mahajan on the other, it is necessary to examine the reasons respectively advanced by them.

Before doing so it will be helpful to note briefly the facts of the case. The appellant who was carrying on business as an estate broker in Calcutta was employed by the respondent on the terms mentioned in a commission letter dated the 5th May, 1943, to "negotiate the sale" of premises no. 27, Amratolla Street, Calcutta, belonging to him. The commission letter was couched in these words : "Anisendra Kissen Mitter of No. 20-B, Nilmoni Mitter Street, Calcutta, do hereby authorise you to negotiate the sale of my property, No. 27, Amratolla Street, free from all encumbrances at a price not less than Rs.1,00,000. I shall make out a good title to the property. If you succeed in securing a buyer for Rs.1,00,000 I shall pay you Rs.1,000 as your remuneration. If the price exceeds Rs.1,05,000 and does not exceed Rs.1,10,000 I shall pay you the whole of the excess over Rs. 1,05,000 in addition to your remuneration of Rs.1,000 as stated above This authority will remain in force for one month from date." The estate broker in accordance with the terms of the contract found two persons who were ready and

willing to purchase the property for Rs.1,10,000, and by letters exchanged with them on 2nd June, 1943, he purported to conclude a contract for the sale of the property and communicated the same to the respondent by a letter. In spite of receiving this information, the respondent entered into an agreement on 9th June, 1943, with a nominee of said persons for the sale of the property for Rs.1,05,000 and finally executed a conveyance in their favour on 8th December, 1943. The appellant thereupon, brought the suit alleging that the contract concluded by him with the purchaser on 2nd June, 1943, was binding on the respondent and claimed for payment of Rs.6,000 as remuneration in accordance with the terms of the contract, entered into earlier between the respondent and himself. In the alternative the estate broker claimed the same sum as damages for breach of contract. In defence the respondent raised three points. They were (1) that the appellant had no authority to conclude a binding contract for sale with any one, (2) that the purchaser refused to complete the transaction stating that they had been induced by fraudulent misrepresentation of the appellant to agree to an exorbitant price of Rs.1,10,000 and (3) that the sale of the property by the respondent was effected quite independently of the appellant. On the strength of these objections the respondent's contention was that the suit of the appellant should be dismissed and that he should not be allowed the relief prayed for.

With these necessary facts before us let us proceed to examine the soundness or otherwise of the reasons advanced by

Justice Patanjali Sastri who delivered the opinion of the majority. Reliance was placed by Justice Patanjali Sastri on the judgment of Justice Kekewich in Chadburn v. Moore⁶ in which the learned Judge had held that a house or estate agent was in different position from a broker at the stock exchange owing to the peculiarities of the property with which he has to deal which does not pass by a short instrument as stock and shares do but has to be transferred after investigation of title as to which various other stipulations which might be of particular concern to the owner may have to be inserted in a concluded contract relating to such property. For these reasons Justice Patanjali Sastri was of the view that "the parties therefore do not ordinarily contemplate that the agent should have the authority to complete the transaction in such case. That is why it has been held, both in England and here, that authority given to a broker to negotiate a sale and find a purchaser without furnishing him with all the terms, means "to find a man willing to become a purchaser and not to find him and make him a purchaser". The learned Judge referred to Rosenbaum v. Balson⁷ and Durga Charan Mitra v. Rajendra Narayan Sinha⁸, in support of his view. The operative part of the judgment delivered by Justice Patanjali Sastri - "The only question is whether the commission is payable on the basis of Rs. 1,10,000 for which the appellant bought a firm offer from the purchasers, or on the basis of Rs. 1,05,000 which is the price

6. 67 L.T. 257.

7. L.R. (1900) 2 Ch. 267.

8. 36 C.L.J. 467; A.I.R. 1928 Cal. 57.

mentioned in the conveyance "//////...." As observed by Lord Russell of Killowmen in the same case⁹, "Where a contract is concluded with the purchaser, the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment no act or omission by the principal can deprive the agent of his vested right." Applying that principle, (even if the commission note in the present case were to be construed as making payment of commission conditional on the completion of the transaction, as it was in the English case) the appellant having 'negotiated the sale' and 'secured buyers' who made a firm offer to buy for Rs.1,10,000 had done everything he was required by the respondent to do and acquired a right to the payment of commission on the basis of that price which he had successfully negotiated, subject only to the condition that the buyers should complete the transaction of purchase and sale. The condition was fulfilled, when those buyers eventually purchased the property in question, and the appellant's right to commission on that basis became absolute and could not be affected by the circumstances that the respondent for 'some reasons' of his own sold the property at a lower price. We accordingly hold that the appellant is entitled to the full commission of Rs.6,000. The appeal is allowed the decree passed on appeal in the Court below is set aside and that of the trial Judge restored//////...."

Justice Mahajan delivered a dissenting judgment. Justice Mahajan gave various reasons for differing with the majority

9. Luxor (Eastbourne) Ltd. v. Cooper, L.R. (1941) A.C. 108.

opinion. They may be briefly noted as follows :

(i) The terms contained in the commission note especially that the property was free from all encumbrances and the guarantee about title indicate that the broker was authorised to make a binding contract with the purchasers.

(ii) The words "to negotiate a sale" concluded with two conditions stated above clearly lead to the same conclusions.

(iii) The commission note adds that the broker will be entitled to a certain commission if he succeeds in securing a purchaser strengthens the view that the broker was entitled to enter into a binding contract with the purchaser.

(iv) The Judge emphasised the dictionary meaning of the words: "securing a purchaser" which is "to obtain a buyer firmly." In business transactions to secure a buyer firmly means * that the right to make an offer or acceptance is definitely given. Distinction was also drawn between the words 'secure', 'find' or 'procure'. The word 'secure' gives an idea of safety and certainty.

(v) The terms of the 'commission note' giving to the broker increasing rate of commission on securing a purchaser prepared to give a certain price for the house also supported the view-point of the learned Judge.

(vi) The learned Judge examined the conduct of the parties to the litigation and was firmly of the opinion that his contention was fully supported.

For the various reasons summarised above Justice Mahajan was of the opinion that the broker was authorized to enter into a binding contract with the purchasers.

Alternatively, the Judge held that in any case the broker was entitled to receive a commission of Rs. 6,000 even if the construction placed on the commission note by the trial Judge was accepted as correct.

Justice Mahajan, no doubt, has brought to bear some remarkable and original points to substantiate his view but it is submitted with great respect that his reasoning is a laboured one, wholly against the established judicial attitude in England and America. The majority opinion expressed by Justice Patanjali Sastri undoubtedly represents the correct law and can be supported by a long line of English decisions. A number of English decisions have already been referred to in the judgment of the learned Judge, and do not need repetition.

Coming now to the next category which deals with circumstances under which authority in an estate agent to enter into a contract for the sale of his principal's estate will be implied, we have the leading Indian case K. Appa Rao v. Gopal Das and another¹⁰. In this case the facts were these. The estate agent, defendant no. 2, was authorized by his principal defendant No. 1 to negotiate and complete a sale of his bungalow for a specified price within a particular time. The letter authorising the agent to do so was couched in the

10. (1945) 2 M.L.J. 363: I.L.R. (1946) Mad. 463: A.I.R. 1946 Mad. 42(44).

following words:- "I hereby agree to give you brokerage of two per cent, that is, Rs.540 for negotiating and completing the sale of my bungalow No. 3, Vasu Street, Poonaallee High Road, Kilpauk, Madras, the same to be paid only on completing the transaction and as soon as the sale deed is registered provided the offer is for Rs.27,000 net, that is, all expenses to be borne by the purchaser. Time for this is upto 6th November, 1941, after which date this letter will be null and void."

The plaintiff-appellant sued on the Original Side of the Madras High Court for damages for the breach of a contract to sell him a bungalow belonging to defendant no. 1. His allegation in the plaint was that defendant no. 2 had entered into a contract with him for the sale of bungalow belonging to defendant No. 1, stating that he was empowered to do so. Defendant No. 1 did not recognize this contract and he sold his bungalow to a third party for Rs.32,000. The learned trial Judge (Chandrasekhara Aiyer, J.) decided the case against the plaintiff on the ground that defendant No. 2 had no authority to sell the bungalow of defendant No. 1. The plaintiff appealed against the judgment and decree of the trial Judge. Leach, C.J. and Lakshmana Rao, J., who heard the appeal were of opinion relying on some English decisions, which will be presently mentioned, that the estate agent (Defendant No. 2) was fully

Buckley, J., "authorising a man to sell means an authority to conclude a sale; authorising him to find a purchaser, means less than that - it means to find a man willing to become a purchaser, not to find him and also make him a purchaser."

Accordingly, the learned Judges laid down the following principles of law :- "Each case must, of course, depend on the nature of the authority, but when an agent is authorised to negotiate and complete a sale for a specified price within a particular time, it gives him authority to enter into a contract for sale, whether it be for immovable or movable property.

Before trying to justify the aforesaid judgment of the Madras High Court it will be convenient to dispose of certain objections which were suggested by Justice Patanjali Sastri in the case of Abdulla Ahmad v. Animandra Kissen Mitter¹², which are necessary to be taken into consideration before arriving at a correct conclusion whether or not an estate agent or broker has authority to enter into a contract for the sale of his principal's land or estate. The suggested objections, in the aforesaid case, were these :- (1) estate broker besides being told the price for which he has to secure a purchaser must also be told by his principal, other terms such as those relating to the payment of the price, (2) the investigation and approval of title, (3) the execution of the conveyance and the parties who are to join in such conveyance, (4) the costs

12. (1950) S.C.J. 153; (1950) S.C.R. 30.

incidental thereto and so on. It can hardly be doubted that all these points are necessary to be taken into consideration in order to judge whether the estate agent is really authorised to enter into a contract for the sale of his principal's estate. It is a well known principle of law that where some authority is specifically conferred on an agent, there arises an implication that he has authority to do all acts necessary to spell out and complete the authority expressly conferred on him. As already referred to earlier, Story in his Law of Agency has clearly stated, that when an agent is given a specific authority he has the power to do all acts necessary to execute it. American Law is no different on this point, for according to it incidental authority consists of acts usual or necessary to do a particular authorised act.

It can therefore be stated with confidence that in the Madras case where estate agent was authorised to 'negotiate and complete the sale of his principal's bungalow' he had incidental authority to enter into a contract for the sale of the bungalow and also to settle other matters necessary to complete the sale. All the suggested objections of Justice Patanjali Sastri which he regarded as aids to a proper construction of the authority in an estate agent to enter into a contract of sale on behalf of his principal in respect of his estate are, it is submitted, fully satisfied.

The American Law on the subject is different. An authority conferred on an estate agent 'to sell principal's real estate' has been interpreted by the Courts as merely authorising the agent to

procure a purchaser ready, able and willing to purchase the principal's land. American decisions¹³ emphasise that there should be available in the authority conferred, some other details for instance other plentude of detail as to the way in which the transaction is to be handled and the terms on which it is to be made before it can be inferred that the agent was clothed with authority to enter into a contract with the purchaser for the sale of the principal's land.

It is submitted & with great respect that the American authorities do not lay down the correct law. The reason for differing from the American view is precisely this that once a principal authorises his agent to sell his real estate, it follows that the agent has incidental authority to do all acts to give effect to the specific authority conferred on him. To the author, the correct view of the law appears to be, that if the principal does not desire to empower his agent to enter into a contract for the sale of his real estate, he should specifically mention it as a limitation on the agent's authority, otherwise he should be held bound. There appears to be no justification for the American view as it is clearly a departure from their generally accepted principle of law that to spell out an express authority an agent has incidental authority to do all necessary acts to give effect to the authority specifically conferred on him. The law on the subject as enshrined in the American Restatement of Agency Law may now be dealt with.

Section 53 reads thus :-

13. Lyon v. Pollock (1878) 99 U.S. 668; McCartney v. Campbell (1932) 216 Cal. 715.

"Meaning of 'To buy' and 'to sell' :- Authorisation 'to buy' or 'to sell' may be interpreted as meaning that the agent shall :

(a) find a seller or a purchaser from whom or to whom the principal may buy or sell;

(b) make a contract for purchase or sale; or

(c) accept or make a conveyance for the principal.

Let us examine the comment given on this section 'Unless the price and other terms have been completely stated by the principal, it is the normal inference that an agent employed 'to buy' or 'to sell' land and not given a formal power of attorney is authorised merely to find a seller or a purchaser with whom the principal is to conduct the final negotiations. This inference is strengthened if the agent is a broker who ordinarily merely solicits; even where the complete terms have been set out, it is ordinarily inferred that such a person is employed merely to find a customer. Authority to accept or to make a conveyance of land for the principal is found only if clearly expressed in the authorization or clearly indicated by the circumstances."

We now proceed to consider the third category - circumstances in which an estate agent will be empowered to convey the land of his principal. In India we have no case on the subject but it transpires from a general consideration of the cases discussed under the two earlier categories that an agent will be

so empowered only when the words of authorization are very clear and not ambiguous. The law in England and America are to the same effect.

For easy reference section 188 of the Indian Contract Act is reproduced here :-

"An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose; or usually done in the course of conducting such business."

The above section makes it amply clear that every agent who is authorized to conduct a particular business has implied authority to do whatever is incidental to the ordinary conduct of such business and whatever is necessary for the proper and effective performance of his duties but not to do anything outside the ordinary scope of his employment and duties. An examination of the facts and principles laid down in some leading Indian cases will indicate the scope of this section. Indian cases do not indicate any precise criterion to judge as to what is necessary to do an act. The question being one of fact it is impossible to lay down any principle for its determination. One has therefore to base his conclusion from a study of practices prevailing in similar business. In a leading case Municipal Board Jaunpur v. Banwarilal¹⁴, it was held by Justice Mulla that where an agent had been authorised by his principal to receive payment due to him, he was not authorized to institute a

14. A.I.R. 1939 All. 623.

suit in a civil Court for the recovery of the amount due to his principal. It was further suggested by the Judge that the agent could only have such a power when the amount was transferred or assigned to him.

Proceeding to analyse the ratio decidendi of the case we find that it is very clear that first of all the express authority conferred on the agent has to be examined and then we have to ask the question whether the power desired to be exercised by the agent was one which was necessary to work out the express authority or was it a usual practice in a similar business. In this case the agent was expressly authorized to receive money due to his principal. The power conferred on the agent simply signifies that if the debtor or debtors of the principal as the case may be, pay the amount of his or their debt the agent has the authority to receive it. It is, therefore, obvious that it is neither necessary & nor usual for an agent in such a case to do any act to realise the amount. In determining the incidental authority of agent a distinction has been well drawn between a trading and a non-trading business. Though these terms have not been defined in the Indian Contract Act, judicial pronouncements lay down a test and the test is whether the business has as one of its essential functions the work of buying and selling, besides other things, if so it is a trading business otherwise not. Borrowing power is one of the necessary incidents of a trading business. The reason is obvious for the normal work of the business cannot be transacted without it.

In a leading case Bank of Bengal v. Ramanathan Chetty¹⁵, the Privy Council laid down that where an agent was expressly authorised to borrow money and lend it to clients he had an implied authority to pledge the principal's credit for borrowing. The reason is obvious. In a money-lending business a normal and necessary feature of the same is to borrow money as otherwise the principal work of the business cannot be carried on. In all such business it is usual for an agent to share this authority. In furtherance of the business it is equally necessary for the agent to possess this power.

In another case Paboodan Goolabchand v. M.F.V. Millers and another¹⁶, the learned Judges of the Madras High Court held that if an agent appointed to manage an estate, but having no express authority to borrow, were to borrow money, his action would not bind the principal. Section 188 of the Indian Contract Act gives implied authority to an agent only in respect of those acts not covered by express terms when it is either necessary or is usual in the carrying on of the business. In the management of an estate it is normally neither necessary nor usual, to possess a borrowing power. It cannot therefore, be recognised as an incidental authority in favour of an agent.

In K. Appa Rao v. Gopal Dass¹⁷ the Madras High Court held that where an agent was authorized 'to negotiate and complete a sale for a specified price within a particular time' he had an

15. L.R. 43 I.A. 48; 30 M.L.J. 232; I.L.R. 43 Cal. 527.

16. (1938) 2 M.L.J. 688; A.I.R. 1938 Mad. 966 (969) (D.B.).

17. (1945) 2 M.L.J. 353; I.L.R. (1946) Mad. 465; A.I.R. 1946 Mad. 42(44).

implied authority to enter into a contract of sale irrespective of the fact whether the subject-matter of the sale was immovable or movable property. The express authority conferred on the agent in this case was 'to negotiate and complete a sale for a specified price within a particular time'. We find, thus, that all authority to knock down a complete sale was given to the agent. In order to give effect to the express authority it became necessary for the agent to enter into a contract for a sale after finding a purchaser who was ready and willing to comply with the terms laid down by the principal and in accordance with which the agent was to act. To enter into such a contract was, therefore, undoubtedly the incidental authority of the agent. Consequently it can be asserted with confidence, that the decision given in the aforesaid case is correct. The view propounded in the above case was in many respects examined and elaborated in an earlier case of the same High Court in Sangali Solagan v. Nagamuthu Malavadi and others¹⁸, where it was laid down that when a principal had authorised his agent to effect a sale of property belonging to him it must be taken that the authorisation would cover all the terms that the agent agreed to unless the authorisation was limited in any manner. This case can clearly be regarded as laying down a proposition of law that where an authority is given to an agent to sell a property then unless some limitation can be read in the terms of the authority a necessary implication arises that the agent is fully empowered to dispose of the property.

18. A.I.R. 1925 Madras 227.

Cases concerning the construction of the power of attorney conferred on agents in India, abound. In an Oudh case¹⁹ . . . decided by Justices L.S. Misra and M.H. Kidwai it was held that in construing a power of attorney in favour of an agent which was given for various purposes, the governing object of which was power to sell, all other purposes must be read as ancillary to the governing object to sell property. It was further held in this case that power to sell implied power to clarify title and settle dispute necessary for affecting sale, in accordance with section 55 of the Transfer of Property Act. Let us examine the soundness of this view according to the provisions of section 188 of the Indian Contract Act. Express authority was given in this case to the agent to sell property. The question arose whether any incidental authority arose out of the express authority. If an agent was empowered to sell property, it was obvious enough that he must possess authority to clarify title and do all he was required to do in order that the property could be sold. Nobody would be prepared to purchase a disputed property and therefore the agent must be deemed to possess a right to settle the dispute concerning the property which was to be the subject-matter of sale. The irresistible conclusion, therefore, is that whatever power was held to be implied in the aforesaid case was necessary to do the act in question.

In another important case Ezakiel v. Carew Co.²⁰, bearing on the question of construction of a power of attorney in favour

19. U.P. Government v. C.M.T. Association, A.I.R. 1948 Oudh 54(61).

20. I.L.R. (1938) 2 Cal. 190.

of an agent the learned Judges of the Calcutta High Court laid down that a power of attorney was to be construed strictly and that the general words must be interpreted in the light of the special powers. It was further observed by the learned Judges that included in that power were "incidental powers necessary for carrying out the authority". There is thus a consensus of judicial opinion in India that all acts necessary to be done in order to carry on the work or business is implied in favour of an agent.

An equally important case on the construction of a power of attorney in favour of an agent is Ramanathan v. Kumarappa²¹, in which Justice Abdur Rahman of the Madras High Court laid down that in construing a power of attorney it was necessary to bear in mind that where a power was conferred by virtue of a power of attorney on an agent to adjust a particular matter, it did not invest the agent with the power of referring the disputed matter for settlement to arbitrators. This view can be supported on two important principles: (i) that the agent should not delegate the authority vested in him by virtue of the powers given in the power of attorney acting on the well-known maxim 'delegatus non potest delegari'; (ii) that the power to refer a disputed matter to arbitration for settlement is the exercise of an unusual power and according to the provisions of section 188 of the Indian Contract Act, such a power cannot be implied in favour of an agent unless it is conferred upon him by the express terms of a contract. The decision accordingly supports

21. A.I.R. 1940 Mad. 650.

the view that no power can be implied in favour of an agent unless it is either necessary for doing an act or business or is usual in carrying on a similar business.

In another Madras case, Gowardhan Dass v. Fredman's Diamond Trading Co.²² the learned Judges of the Madras High Court held that in construing a power of attorney in favour of an agent it was necessary to bear in mind that an agent did not possess an implied authority to assign a decree passed in favour of the principal. The case is important in the sense that a power of attorney is generally understood as conferring large and varied powers in favour of an agent and the impression that usually gains ground is that an agent steps into the shoes of his principal for transacting all important acts on his behalf. While a general agent does usually supervise the proceedings of a pending law suit to watch and protect the interest of his principal it is neither usual nor necessary that the agent should be empowered to assign the decree passed in favour of his principal. The decision is therefore important as it lays down the limitations of authority possessed by an agent. Unless such a power is specifically given in favour of an agent he cannot exercise it, it being wholly unusual and unnecessary for carrying on the business of the principal.

An illuminating case decided by the High Court of Travancore-Cochin is Pazhaniapiappa Chettiyar v. South India Planting and Industrial Co., Ltd.²³, the learned Judges of the High Court

22. A.I.R. 1939 Mad. 543.

23. A.I.R. 1953 T.C. 161.

held that an authority given to an agent to sell for cash will enable him to sell not merely for prompt payment of cash but also for deferred payment. Furthermore it was held that the only condition that was appended to the authority was that the sale must be for the best price. An authority to sell must certainly include an authority to agree to sell. This case is very instructive for the reason that it indicates the scope of incidental authority of an agent. It is usual to expect that the purchaser may not be able to make an immediate payment of the price and that he may make payment in instalments. If the price is a reasonable one no objection can be raised because when a principal confides in his agent a power to sell, he has in contemplation the usual difficulties that may confront a seller in the realization of purchase money. A power to agree to sell is something that is included in a power to sell and therefore no difficulty arises.

The Law in England regarding the circumstances in which an estate agent is entitled to get remuneration are not well settled. In any case, certain general principles have been laid down by the Courts and an attempt is here made to explore them.

In Midgley Estates v. Hand²⁴, Jenkins, L.J., said: "So far as any general principle is deducible from the authorities, their effect may, I think, be summarised : The question depends on the the construction of each particular contract, but prima facie the intention of the parties to a contract of this type is likely to

24. L.R.(1952) 2 Q.B. 432 at 435-436, C.A.

be that the Commission stipulated for should only be payable in the event of an actual sale resulting . . . That is, broadly speaking, the intention which, as a matter of probability, the Court should be disposed to impute to the parties. It follows that general or ambiguous expressions, purporting, for instance, to make the commission payable in the event of the agent "finding a purchaser," or . . . "selling the property", have been construed as meaning that the commission is only to be payable in the event of an actual and completed sale resulting, or, at least, in the event of the agent succeeding in introducing a purchaser who is able and ready to purchase the property.²⁵ That is the broad general principle in the light of which the question of construction should be approached; but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms, even if they do involve the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed, for some reason or another, turns out to be abortive.

"It is possible," said Lord Russell in Luxor (Eastbourne) v. Cooper²⁶, "that an owner may be willing to bind himself to pay commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction would - require clear and unequivocal language." As an example the words "in the event of business resulting" are no

25. Martin v. Perry, L.R. (1931) 2 K.B. 310; James v. Smith, L.R. (1931) 2 K.B. 317 (C.A.).

26. L.R. (1941) A.C. 108 at 129.

clear and unequivocal²⁷. The requirement that the agent "introduce a purchaser" or "find a purchaser" or "find someone to buy" necessarily involves, at the least, the introduction of a person who becomes bound in law to complete the purchase. Clearly a person who makes an offer "subject to contract" has not, on the acceptance of that offer, entered into a binding agreement and such an offer is not firm offer.²⁸ In order that an estate agent may be entitled to commission it is necessary that the purchaser he has found out must remain until completion or until such time as the vendor withdraws from the transaction.

A case which may possibly change the entire judicial outlook, or at least invite re-thinking is Nelson v. Rolfe²⁹. In that case the facts were these: The principal had stipulated that the agents were to be entitled to a commission on introducing a person able, ready and willing to purchase the property. The agents introduced A who as a matter of fact, fitted this description; but, without having withdrawn the agent's authority, the vendor had already given an option to purchase to B, to whom the property was later sold. It was held that the agents were entitled to their commission. It is submitted that the case can be regarded as an authority for the proposition that if an agent is able to find a proper purchaser who sticks to his proposal to

27. Murdoch Lowrie v. Newman, (1949) 2 All. E.R. 783.

28. Benneth, Weldon & Co. v. Wood, (1950) 2 All E.R. 134;
Chntic Owen and Davis v. Stockton (1953) 1 W.L.R. 1353;
 (1953) 2 All E.R. 1149.

29. L.R. (1950) 1 K.B. 139 C.A.

purchase the property till the vendor has opted to sell it to somebody else, the agent will be deemed to have performed his duty and accordingly he will be entitled to his remuneration. However if the principal has already sold the property before the agent introduces a purchaser ready and willing to purchase the property and complying with all the requirements laid down by the principal, then the agent will not be entitled to a commission because the principal has the right to sell his property inspite of the fact that he has appointed an agent to find a purchaser.

In American Law an agent who is given power to find a purchaser or to negotiate a sale is entitled on finding a purchaser ready, able and willing to purchase on terms stated by the owner of real estate to receive his due commission even if the owner refuses to complete the sale of his property.

The general rules for construction of powers of attorney in English Law may be broadly stated as follows :- Powers of Attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implications.³⁰ The following are the most important rules of constructions --

(1) The operative part of the deed is controlled by the recitals where there is ambiguity.³¹

30. Bryant v. La Banque du Peuple, L.R. (1893) A.C. 170 P.C.

31. Illustration 1. Bowstead's Law of Agency, pp. 53, 54.

(2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular act.³²

(3) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose.³³

(4) The deed must be construed so as to include all incidental powers necessary & for its effective execution.³⁴

Some important cases under English Law will now be examined in order to evaluate the general rules for construction of powers of attorney by Bowstead in his Law of Agency under Article 35.³⁵ A case of considerable importance is Reckitt v. Barnett Prembroke³⁶ and the facts of the case were these :- The appellant Sir Harold Rockitt, who was going abroad gave to Lord Terrington, (known as H.J.S. Woodhouse) a solicitor, a power of attorney dated 9th February, 1915, to enable him to manage the appellant's affairs while he was in France. Lord Terrington wanted to draw cheques from the appellant's bank on

32. Illustrations 2 and 3

33. Illustrations 4 to 7

34. Illustrations 8 to 9.

} Bowstead's Law of Agency,
pp. 53, 54.

35. Bowstead's Law of Agency, Page 52 - Article 35.

36. L.R. (1929) A.C. 176.

the basis of power of attorney. The Bank advised him to obtain specific power for the same. Lord Terrington wrote to his principal for the extension of his power, to which he agreed and sent a letter of authority addressed to the Bank couched in the following words :-

"Dear Sirs,

Referring to the power of attorney which I have given in favour of Mr. H. James Seltorne Woodhouse the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction."

The letter was dated 17th August, 1915, and since then it remained in the possession of the Bank.

In December, 1925, the appellant went to India and again expressed his desire to avail of the services of Lord Terrington as before. Another power of attorney was prepared and executed. But was never used, the old power of attorney was continuously acted upon. The respondents were a firm of motor car dealers. On 4th January, 1926, a hire-purchase agreement was entered into in respect of Rolls Royce Car between Lord Terrington and the respondents. In connection with this private transaction of his, he had contracted debts and made payment to the respondents from his principal's money . . . Early in July the appellant ascertained that frauds had been committed by Lord Terrington and an action was brought to recover from the respondents the sum of £ 200 which the respondents had received as the proceeds of the cheque.

The following passage from the judgment of Lord Halsam, L.C. is here reproduced :- "I assume for the purpose of my judgment that the letter of August 17, must be treated as a general extension of the power of attorney and not merely as an instruction to the bank.

The question then is whether the power of attorney plus the letter did give Lord Terrington authority to use the appellants' money for the purpose of paying his private debts. This is purely a question of construction. It is plain that the letter has to be read in conjunction with the power of attorney to which it expressly refers; when so read it seems to me that the whole authority is expressly limited to acting for the appellant in the management of his affairs; and I cannot construe the addition of the words "without restriction," as entitling Lord Terrington when he is drawing cheques on the appellant's account to do so for any other purpose except for the discharge of the appellants debts or in the conduct of the business."

The other Law Lords agreed with the opinion of their brother Judge. The House of Lords accordingly decided that the order of the Court of Appeal be reversed and judgment of Rowalatt be restored. The respondents were called upon to pay the costs in the Court of Appeal and also the costs of the appeal before them. Cause was remitted back to the King's Bench Division to do therein as shall be just and consistent with their judgment.

This case clearly illustrates the following principles stated by Bowstead referred to earlier (1) that where authority is given to an agent to do particular acts, followed by general words they are restricted to what is necessary for proper performance of the particular acts and (2) general words do not confer general powers but are limited to the purpose for which the authority is given and are construed as enlarging the special power only when necessary for that purpose.

In Midland Bank v. Reckitt³⁷, it was held that where there was a clause in a power of attorney that whatever may be done by his agent in exercise of the power conferred on him will be ratified did not authorise the agent to exceed the authority given in other parts of the power of attorney.

The American Law may now be examined on the subject of construction of powers of attorney. The available cases are so diverse in their facts that they do not permit of laying down certain broad principles or rules of construction. However a few rules can be stated with impunity thus :-

(1) , Where the language of the instrument is of broad scope, in construing it great caution is needed in two respects -

(a) The nature and incidents of the transaction for which power is conferred usually limits the broad language employed.

(b) An agent will only be deemed to be authorized to do an act when the words used in the power of attorney are very clear and explicit.

37. L.R. (1933) A.C. 1.

In Brantly v. Southern Life Insurance Co.³⁸, the facts were these : A farmer who was intending to leave, temporarily his State, gave the following authority to his agent "to sign my name in the general transaction of my business, giving and granting upto my said attorney full power and authority to do and perform all and every act or thing whatever requisite and necessary to be done in the general transaction of my business" The Court held that the power of attorney did not confer on the agent authority to sign principal's name to a note given in settlement of his alleged liability on a penal bond, given in a matter having no connection with his farming business. Von Wedel v. McGralt³⁹ is a very illuminating case in point in which Goodrich Cerie, J., concurring said, "I go along with the result, because I think it is supported by authority and the subject is not one on which to try to start a revolution. But it seems to me that the whole thing is incongruous. A man has said in effect, that he gives another the power to do everything for him. Then he enumerates certain specific things which the other may do, carefully saying however, that he does not mean to alter the general power by stating specific powers. Then he ends up by saying that he means his language to be as broad as he stated it. Yet the rule seems to be that he is held to mean something much less than indicated by the language he used. Perhaps the law cannot quite say that white is black. But in this instance it certainly can make white look a pretty dark grey."

38. (1875) 53 A11a, 554.

39. (1950) 180 F. 2d. 716.

The American Restatement of the Law of Agency states the law on the subject in section 37⁴⁰ thus :- (1) "unless otherwise agreed, general expressions used in authorising an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates. (2) The specific authorisation of particular act tends to show that a more general authority is not intended."⁴¹

The reason of strict interpretation of power of attorney appears to be that if liberally construed, the idea conveyed would be that the agent is entrusted with much greater powers than the principal intends to confer on him. The section is intended to remove this misapprehension and to make it clear that where words are employed in a power of attorney which, if

Illustrations of sub-section (1) :

(4) P gives A a power of attorney to convey Blackacre, containing a clause: "giving and granting to my said attorney authority to do all acts as fully as I might, or would do, if personally present". A has authority only to convey Blackacre in an usual manner.

(5) P operates separately a lumber mill in town X and a shoe store in town Y a hundred miles away. P appoints A, a local collector in Town X, "To collect all of my accounts." Nothing else appearing, this is interpreted as applying only to accounts in connection with the lumber mill.

Illustration of sub-section (2) :

A manufacturer of automobiles directs his selling agents to warrant the cars against defects in such parts as have been manufactured in his factory. It is inferred that his agents are not authorised to warrant the car as a whole or those parts which have been purchased from other manufacturers.

40. Restatement of the Law of Agency-Section 37, p. 128, 2nd Edition.

41. Agency Article 58, page 49.

interpreted liberally give expression to grant of general authority, should normally be interpreted as authorizing the agent to act only in connection with the business in which the agent is employed.

Section 39 of the Restatement of Law of Agency lays down another important rule of construction thus :

Inference that Agent is to act only for principal's benefit : Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal."

Some salient features of the implied authority of certain category of special agents in India may now be examined.

A leading case on the subject of implied authority of an Advocate in India is Surendra Nath Mitra and other v. Tarabala Dasi⁴². In this case the facts were briefly these : A parda-nashin lady had authorised her Advocate to compromise the case. Her Advocate had kept his client fully informed regarding all developments in the case. On these facts it was held that an agreement entered into by the Advocate to compromise the case was binding on his client. In disposing of the above case in appeal their Lordships of the Privy Council laid down the following principles of law :-

"An Advocate of the High Court has, when briefed on behalf of a party in a subordinate Court the implied authority of his client to settle the suit. He must be treated as though

42. 58 M.L.J. 551: L.R. 57 I.A.133:A.I.R. 1930(P.C.) 158 per Viscount Sumner, Lords Atkin and Thankerton and Sir John Wallis.

briefed on the trial of the suit, though he may be engaged to press an interlocutory application. The power to compromise a suit is inherent in the position of an Advocate in India. The considerations which have led to this implied power being established in the Advocate of England, Scotland and Ireland, apply in equal measure in India.

The implied authority to counsel is not an appanage of office, a dignity added by the Courts to the status of Barrister, or Advocate at law. It is implied in the interests of the client to give the fullest beneficial effect to his employment of the Advocate. Secondly the implied authority can always be countermanded by the express directions of the client. No Advocate has actual authority to settle a case against the express instructions of his clients. If he considers such express instructions contrary interests of his client, his remedy is to return his brief."

In America an attorney has no implied authority to compromise the case on to the behalf of his client.⁴³

Principles of law laid in Askaran Choutmal v. E.I.Rly. Co.⁴⁴, are illuminating and may be quoted thus :- "An Advocate of the High Court in the course of conducting the case is clothed with authority to compromise a suit in which he has been retained as counsel and such a compromise would be valid and binding upon the parties even though it had been effected

43. *Ricketts v. Pennsylvania R.Co.* (1946) 153 F. 2d. 757; Ann; 66 A.L.R. 107.

44. A.I.R. 1925 Cal. 696 per Page, J.

contrary to the express instructions of the client, unless the prohibition had previously been communicated to the other side.

But the apparent authority of counsel is restricted to acts and admissions Coram Judice or in Court; such acts and admissions out of Court do not bind the client unless in fact they are authorised by the client or by his agent duly authorised by the client in that behalf. A compromise therefore effected by Counsel out of Court and not assented to by the client is only binding upon the client if it is expressly authorised or subsequently ratified by the client or by his agent authorised in this behalf."

It is submitted with great respect that the principle of law laid down in the case that an Advocate has power to compromise a case on behalf of his client when the latter has expressly prohibited him to do so is erroneous. Privy Council case already discussed has clearly laid down the principle that an authority to compromise a case can always be countermanded by the client. The other principle laid down that the authority to compromise or make admissions does not extend beyond the limits of the Court is no doubt commendable.

A case relating to the implied authority of an auctioneer is R.P. Kharas and others v. Bawanji Narsi⁴⁵, in which the following principles were laid down by the Sind High Court: " No doubt an auctioneer, is classified as an agent but it must not be overlooked that the nature of his duties invest him with certain

45. A.I.R. 1926 Sind 6.

rights which differentiate him from an ordinary agent. In his capacity as an auctioneer he has an interest in the goods entrusted to him for auction sale. He has a lien upon them for his charges and advances. His custody of the goods is not the pure custody of an ordinary agent, but he, by virtue of the auction of the principal's goods, acquires a special property in the goods which are in his possession for the purpose of the auction sale . . . The English authorities are very explicit as to the right of an auctioneer to sue and his liability to be used."

Summing up the discussion of incidental authority of an agent in India, we find that the cases decided under section 188 of the Indian Contract Act, 1872, state precisely the same law as we find in the law of England and America, with some slight differences. Mechem in his book - Law of Agency - has stated that incidental authority consists of "acts which are either usual, necessary or customary". He is supported in his view by American authorities as endorsed in the decisions of the Court.

Custom or usage of the trade, it is submitted constitutes a distinct and important source of implied authority of an agent and if it is mixed up with the notion of incidental authority it will be fatal to a proper development of the varied sources of implied authority. To classify sources of implied authority of an agent under broad and well-defined categories has its merits, and in particular it may be pointed

out that scholars and practitioners of law can always lay their hands on specified sources of implied authority in the study or presentation of cases before the Courts.

Some amount of overlapping in the various sources of implied authority is inevitable but efforts should be made to maintain clear cut divisions as far as possible so that benefits may be reaped by all connected in any manner with the subject under discussion. It is delightful to find that the Courts in India without mentioning the term 'Incidental authority' have evolved principles, while disposing of cases under section 188 of the Indian Contract Act, 1872, which are in line with English and American thinking. The development of law has been commendable, and has pursued a course, more or less on the pattern of English Law.

CHAPTER IIIAGENT'S IMPLIED AUTHORITY IN AN EMERGENCY

The purpose of writing this chapter on "Agent's Implied Authority in an Emergency" is to high light certain aspects of the problems of policy and purpose that underlie the principles of law on the subject and to offer certain suggestions for improvement of the Indian Law.

The author proposes to examine mainly the Indian Law but references to comparative English and American Law will be made wherever deemed proper in support of his view-point.

It is a well known principle of law that an agent can act on behalf of his Principal when he has authority, which is either express, or implied but not otherwise. When an emergency occurs a vaccum is created in the sense that the previous instructions of the Principal to his agent become redundant and meaningless as they were meant for normal circumstances. The main question then is in the absence of authority how is the agent to protect the interest of his Principal ? To furnish an answer to this question, two problems which arise as a corollary to it, have to be discussed. They are - First, what is the best way to protect the interest of the Principal and yet preserve the sanctity of the principle, that an agent can only act on behalf of his principal when he has authority. Second;

how to absolve the agent of the responsibility of being saddled in damages consequent upon his inability to protect the interest or business of his Principal and further, to entitle him to his remuneration, indemnity etc. .

The task of the law, obviously is a difficult one, as in most cases it is practically impossible for an agent to contact his Principal and seek his instructions. In furnishing a solution to the first problem it appears that the Indian Statutory Law embodied in Section 189 of the Indian Contract Act seeks to provide an alternative rule which would be acceptable to any Principal save a few, as most of them are interested in preserving their property or business and not in the way their agents carry on the business. According to Section 189 an Agent is required to act in an emergency in a manner which a prudent man would do in his own case in similar circumstances. This proviso therefore ensures that the agent will act reasonably and in a bonafide manner and will do his very best to preserve the property or the interest of his Principal. In short the law has given the agent a discretion to act instead of following the instructions of his Principal as the same is impossible or impracticable under the circumstances created by an emergency. The authority to act, then is created in favour of his agent by the law and does not flow from his Principal. To this extent the solution of the first problem cannot be deemed satisfactory.

However, the effect of Section 214 requiring an agent to exercise reasonable diligence in communicating with his Principal and seeking his advice is to preserve the sanctity of the

principle referred to in the problems as in cases where it is practicable for an agent to obtain the instructions of his principal that result undoubtedly follows. But as pointed out earlier, communication with the Principal is in most cases impossible. Section 214 creates many difficulties. The phrase 'to exercise reasonable diligence in communicating with the Principal' is a question of fact, hard for laymen, as agents generally are, to judge, whether they have complied with its requirements. Agents who do not act in accordance with Section 214, do not bind their Principals and become liable for their acts to third person with whom they deal.

The doubts thus created in their minds will not enable them to take prompt action unless they have first satisfied themselves that they have complied with the requirements of Section 214. This mental attitude obviously makes the task of meeting the emergency situation very difficult. It is therefore suggested that Section 214, should be properly amended to obviate the impasse. The solution of the second problem depending as it does on the first problem is met with an almost equal degree of satisfaction as in the case of the first. A detailed discussion of the solution furnished by the law to the two problems and its evaluation will be taken up towards the end of this chapter.

Speaking generally if the situation is one that was unforeseen and unexpected it is usually called emergency or necessity, justifying the agent to use his discretion subject

to compliance with certain conditions. The condition precedent to the exercise of implied authority on the part of an agent are set out in sections 189 and 214 of the Indian Contract Act, our inquiry relates to the category of cases where an emergency occurs, and our task is to examine the policy of the law in trying to resolve the conflicting interests of the three parties-namely, principal, agent and the third party who may be involved in the picture. Before proceeding to analyse the way the law has attempted to resolve the conflict, it will be helpful to examine the existing law on the subject of emergency and its elaboration by Judicial decisions.

Section 189 of the Indian Contract Act runs thus :-

"An agent has authority in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances."

Section 214 of the said Act states :- "It is the duty of an agent in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions."

Section 189 and 214 of the Indian enactment do not explain the term ^{emergency} "but decided cases show that the situation in which they arise are not confined to any restricted category of cases as in England. The circumstances in which an emergency will be deemed to arise have not been suggested by the Judges in India. Some of the cases, however, may be interpreted to

to signify that any unforeseen circumstance which was not contemplated by the principal earlier could create an emergency. The magnitude and nature of danger of loss to the principal is not a pre-requisite to the exercise of authority on the part of the agent. To save the principal from ordinary loss would cloth the agent with authority to act, provided, it is reasonably impossible to obtain his advice on the matter.

The facts and the principles laid down in an Indian case Firm Roop Ram - Bhagwan Dass v. Firm Nanak Ram Chhaju Ram¹, show that an agent who informed his principal that he would be compelled, in view of the changed situation, to sell the goods already purchased on their behalf on credit if the principal did not send him money in time, had authority to sell the goods if the principal paid no heed to the agent's telegram, and sent no reply and no money as requested. The principle deducible from the above case, in the opinion of the author is, that, in case, an agent communicates with his principal informing him the changed circumstances and receives no reply, there arises an implication that the agent is authorised to act in a manner he deems proper in the interest of his principal. This case may be regarded as an authority for the proposition that an agent has power to act in an emergency where there are no explicit orders of the principal to the contrary. The judges who decided the above case have not so stated in any part of their judgment and this interpretation represents the personal view of the author. In Har Kishan Singh v. National Bank of India²

1. A.I.R. 1927 Lahore 493.

2. A.I.R. 1940 Lahore 412.

the judges were of the opinion that in the absence of instructions from his principal, an agent has authority to act in an emergency, especially in a case where the goods entrusted to his care are perishable or perishing with the avowed object of saving his principal from loss. It was further pointed out in this case that S. 189 Indian Contract Act is based on certain observations made at pages 225-227 of "Justice Story's Law of Agency."

A judgment of the Allahabad High Court³, emphasised the need for an agent in cases of emergency arising under section 189 to use reasonable diligence in communicating with his principal and in seeking to obtain his instructions". The case is however of little assistance in the study of the subject as it does not throw any light as to the criteria to be adopted for enabling one to find out the meaning and scope of those words.

The Indian decisions are meagre, and with the existing material it is not possible to answer even some of the basic questions, namely :- (1) What is an emergency, (2) The precise meaning of the phrase protecting his principal from loss; (3) who is a person of ordinary prudence; and (4) meaning and scope of the words "using reasonable diligence in communicating with his principal and in seeking to obtain his instructions."

An answer to these basic questions, can, if at all, be found in the Agency laws of foreign jurisdiction notably of

3. Shanti Lal v. Tara Chand Madan Gopal A.I.R. 1933 Allahabad 158.

England and America, which we now proceed to examine. The doctrine of implied authority flowing from necessity or emergency was confined in English Law to certain well known exceptional cases, such as those of a master of a ship or the acceptor of a bill of exchange to the honour of the drawer.

In 1924, Mc. Cardie J. in *Prager v. Blatspiel*⁴, gave expression to an opinion which though obiter is relevant as showing that there was a feeling that the confines of the law on the subject should be extended so as to meet the requirements of the time. The following passage from the judgment is quoted for reference. "There is nothing in the existing decisions which confines the agency of necessity to carriers whether by land or sea, or the acceptor of bills of exchange. The basic principle I think is a broad and useful one. It lies at the root of the various classes of cases of which the carrier decisions are merely an illustration."⁵

Certain conditions were laid down by the learned Judge as a condition precedent to the exercise of the authority conferred on the ground of necessity or emergency by law. They may be stated thus :- (1) Under the circumstances of the case communication with the principal was practically impossible. (2) Actual or Commercial necessity must be in existence for doing the acts in question, and (3) The alleged agent of necessity must satisfy the court concerned that he had acted bona-fide and in the interest of the principal.

4. (1924) I.K.B. 566

5. At page 570.

It was unfortunate that Mc Cardie J's dicta was challenged in subsequent cases. In *Jebara v. Ottoman*⁶; Scrutton L.J. expressed his disapproval of Mc. Cardie J's opinion in the words :- "The expansion desired by Mc Cardie J, becomes less difficult when the agent of necessity develops from an original and subsisting agency, and only applies itself to unforeseen event not provided for in the original contract, which is usually the case where a shipmaster is agent of necessity. But the position seems quite different when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals, and still more difficult when there is pre-existing agency, but it has become illegal and void by reason of war and the same reason will apply to invalidate any implied agency of necessity."

A case of considerable importance is *Sims v. Midland*⁷. There is a carrier on account of seeming delay in transit occasioned by a strike sold goods which were perishable, which were earlier entrusted to him for the purpose of carriage. On these facts the Court held that the action of the carrier was justified on the ground that it was practically impossible for him to get instructions from the owner. A case in point is *Great Northern Railway v. Swaffield*.⁸ It was held in this case that a railway company was entitled to keep a horse with a livery stable keeper when the horse was not met by its owner

6. (1927) 2 K.B. 254 at 257; reversed sub nom. *ottoman v. Jobara* (1928) A.C. 269.

7. (1913) 1 K.B. 106.

8. (1874) L.R. 9 Ex. 132.

at its place of destination and the railway company had no safe accommodation for it. The court further made it clear that under such circumstances the railway company was entitled to recover all the expenses incurred by it in the up keep of the horse from its owner.

There are certain decided cases which show that when an agent employs medical assistance in an emergency, he has implied authority to bind his principal. A case bearing on the subject is *Langan v. Great Western Railway*⁹. There a sub-Inspector had pledged the credit of the railway company for board and maintenance of persons injured in a Railway collision. It was held on these facts that the sub-Inspector was justified in his action in as much as his act was calculated to keep down the damages for which the Railway Company may possibly have been held liable. The court emphasised that the Sub-Inspector was not merely entitled but bound to take that step as it was intended to benefit his principal - the railway company.

The case is important in the sense that it lays down the principle that it is not merely saving the principal from direct loss in an emergency but even indirect loss which may confer on an agent an implied authority to pledge the Credit of his principal.

None of the English cases examined so far throw any light as to what the term 'emergency' signifies. But the observation of Scrutton L.J. suggests as stated earlier the circumstances

9. (1874) 30 L.T. (n.s.) 173 at p. 177.

should be 'unforeseen'. There is one line of English decisions which warrants the view that an agent has no option but to follow the instructions of his principal no matter how serious the emergency may be. In *Howard v. Tucker*¹⁰, the facts were these. A principal in India sent by ship goods to his agent in London and instructed him to review the goods and sell them but not to pay the freight, that already been paid in Bengal. The agent sold the goods but when he was to make the delivery of the same, he discovered that they were stopped for non-payment of freight. The agent paid the freight with the object of getting possession of the goods. The court held that the agent could not recover this advance from his principal as he had acted in disregard to his instructions. The correctness or otherwise of this decision will be discussed in subsequent pages.

A case in point is *Green Leaf v. Moody*¹¹ where the court held that a factor had implied authority to act for his principal in an emergent situation, irrespective of his instructions or the ordinary usages of the trade where the factor acted in good faith and used sound discretion, even though it subsequently turned out that the course adopted by the agent was disadvantageous to his principal.

A similar view was taken in an English case *Tetley v. British Trade Corporation*¹². In that case it was held by the

10. (1831) 1 B.C. Ad. 712

11. 13 Allen 363.

12. 10 Lloyd's List Ref. 678.

court that an agent could disregard the instructions of his principal and remove the goods entrusted to him to another country where he felt that it was unsafe to keep the goods any longer in that country.

In the *Gratitudine*¹³ Sir William Scott maintained that the foundation of implied authority of an agent to act in an emergency was the prospect of benefit to his principal. The same thought has been put in by Sir John Romilly thus: "An agent is bound to do the best he can for his principal and in matters which are left to his discretion he can only act for the benefit of his principal."¹⁴ In *Broom v. Hall*¹⁵ it was held by the court that an agent can exercise his discretion in an emergency but he must pursue a course which a reasonable man would have done in his own case.

Generally speaking the English Judges have been reluctant to widen the area of an agents' discretion in cases of emergency and have tried to confine it within narrow limits, as already discussed earlier. But in the Canadian case of *Hastings v. Semans*¹⁶ it was said that the doctrine has not become static so as to be confined to the cases specified by Baron Parke and Lord Esher. These cases are merely illustrations of a broad principle applicable to various kinds of

13. (1801), 3 Hb. 240.

14. In *pariente v. Lubback* (1955), 20 Beav. 588 at 592.

15. (1959), 7 C.B. (n.s.) 503.

16. (1946) 3 W.W.R. 449.

cases. These broad differences in their approach to the problem of emergency by the different English Judges and the justification thereof will be subsequently commented upon.

The American Law on the subject is in several aspects different and liberal in its outlook from the English Law. An examination of some of the important American cases reveal the broad out look of the Courts.

In *Sibley v. City Service Transport Co.*¹⁷, the facts were these. The defendant's bus driver was carrying passengers who worked on a government project and who had just finished the "swing" shift quite late at night. It was an inclement weather the roads were icy and in a thinly settled area, a wheel rolled off the bus. The driver made all efforts to get help and remedy the situation but failed in his endeavours. Driven by the force of circumstances he procured another bus and driver from a near by arsenal. The new driver unfortunately lost control of the bus and caused the injuries for which suit was brought. It was held in the case that the plaintiff was entitled to recover. The court proceeded to give its finding on the basis of an existence of state of emergency and so held that the regular driver had implied authority to engage a driver and procure a bus as it was necessary for completing his master's errand. According to American law in order to create emergency power, the occurrence must be sudden or unexpected or call for immediate action and

17. 2 N.J. 458, 66 A 2d. 864 (1949).

the contingency must make it impossible for an agent to communicate with his principal.

In another important case *Booth Flynn v. Price*¹⁸ the facts were these : The defendant employed a night watchman to protect their heavy machinery. During night time a leak developed in the gasline of ditch digging machine." All of a sudden he (The watchman) noticed a big puddle around the machine and saw that it was on fire". The plaintiff at that juncture came in automobile and the watchman procured his aid in putting out the fire. The plaintiff was injured in the operation. He sued to recover damages for the injuries sustained by him. The question arose as to what was the status of the plaintiff at the time he sustained injuries. The plaintiff was held entitled to recover on the ground that the jury could hold him an "emergency servant".

The decision in the case is undoubtedly correct as it is hard to conceive of a better case of emergency where it was impossible for the watchman to have communicated with his principal and there was a dire necessity of saving his property. In another notable case, *Hawtayne v. Bourne*¹⁹, there a manager of a mine borrowed money on the credit of the owners, so as to enable him to pay the arrears of wages due to workmen, and thereby avoid the misfortune of levying on materials belonging to the mine by the workmen. Alderson, B. gave the following reason for denying the manager any emergency powers

18. 76 M. & W. 595 (1841).

19. 7 M. & W. 595 (1841).

to pledge the credit of his owners :- "(T) here was ample time and opportunity for him (the manager) to have applied to his principals."

American Courts²⁰ have held that where a rail-road accident occurs in which passengers are injured and the highest agent of the railboard company who is present such as a conductor, calls a physician or a doctor to treat the injured passengers, the company will be bound to pay the charges of the doctor. The American Courts have laid down the principle that under such circumstances, a person such as, the conductor, or other officers who calls in the aid of the doctor has emergency powers and can thus pledge the credit of the company.

A perusal of Section 47²¹ of the American Restatement of Agency (Second) together with comments and illustrations added to it clearly reveal two important points. They are firstly; that the basis of the emergency authority of an agent is the implied consent of the principal and (2) That the occurrence of unforeseen circumstances uncovered by previous instructions of the principal together with the impracticability of communicating with the principal is the foundation of an agent's authority. The American Restatement has made a contribution by analysing the various circumstances in

20. St. Louis A & T R Co. v. Hoover 13 s.w. 1092.

21. Section 47 of the American Restatement of Agency (Second) states :- "Unless otherwise agreed, if after the authorization is given, an unforeseen situation arises for which the terms of the authorization make no provision and it is impracticable for the agent to communicate with the principal, he is authorized to do what he reasonably believes to be necessary in order to prevent substantial loss to the principal with respect to the interests committed to his charge."

which an agent will be deemed to have complied with the requirement of law of having communicated with the principal with a view to obtain his instructions. In particular it has been indicated that where an agent has to incur expenses which are disproportionate to the business to be transacted he need not communicate with his principal. In short the Restatement has clearly indicated the meaning and scope of the words :- 'using reasonable diligence in communicating with his principal and in seeking to obtain his instructions'.

Having examined some of the important English and American decisions it now remains to give a brief summation of the lines on which the law has developed. Before doing so it is important to make a few observations regarding the apparent contradictions in principles which are noticeable in some of the cases. The English case *Howard v. Tucker*,²² appears to lay down the principle that an agent has no implied authority to do acts in contravention of the express instructions given him by the principal in a situation arising out of necessity. Another English case *Tetley v. British Trade Corporation*²³ laid down the principle that an agent could disregard the instructions of his principal under the circumstances of the case.

These two cases may appear to lay down a contradictory principles but a critical examination of the facts of these

22. (1831) 1 B.C. Ad. 712 See ante.

23. 10 Lloyd's List Ref. 678 See ante.

cases and the reasons advanced by the learned Judges clearly warrant the inference that the two cases do not lay down contradictory principles but on the other hand are helpful in finding out what an emergency is, which entitled an agent to exercise implied authority. In the first case it is clear from the facts that the principal had clearly instructed his agent not to pay freight as in his opinion the same was already paid in Bengal. Obviously the principal had in mind that freight may be demanded and he had taken care to give instructions on that matter. Whenever a matter has already received the attention of the principal and he has issued definite instructions to his agent, (he has no authority to act in disregard of the same. It is only when a new situation arises on the happening of an unforeseen event that the agent is entitled to exercise powers to meet the emergency and possibly there can be no instructions of the principal on that matter as it could not have been in his contemplation at that time.

In the second case - Tetley v. British Trade Corporation a situation arose, which was never in the contemplation of the principal, obviously therefore there could be no instructions which he could have issued to his agent, concerning the changed situation. The former instructions of the principal had no bearing on the changed circumstances and therefore, were of no avail and could be disregarded by the agent.

The distinction between the facts of the above mentioned cases is thus marked - in the first the principal visualised the situation that may possibly arise and he gave his instructions

No law can ever permit an agent to act against his clear instructions. In the second case the principal had given instructions for his activities in normal circumstances, but as he could not contemplate any unforeseen happenings he could not possibly have issued any instructions regarding the same.

All that could be said in such a case was that the agent was disregarding the spirit of his principal's instructions which had become redundant in an emergency.

These two cases therefore do not lay down differing principles but on the other hand explain the fact that to clothe the agent with authority it is necessary that there should be such a change in the circumstances as could not have been in the contemplation of the principal.

The development of law in England has not been uniform. Mac Cardie J. attempted to widen the area of an agent's implied authority in an emergency. Scrutton L.J. and Lord Esher substantially narrowed its scope, and the Canadian case restored it to its former position. The difference of approach between these English Judges is not surprising. There has been a traditional reluctance amongst them, generally, not to change the law as they are of the view that this task properly belongs to the legislative agency; however a few of them have been inclined to affect and recognise the necessity of making changes in the existing law as otherwise the results would be disastrous. As such Mac Cardie J was inclined to take a broader view and to recognise that any emergency situation

would be enough to call in the aid of the court. On the other hand as one would expect of the English Judges, Scrutton and Lord Esher JJ. were prepared to expand the law only in very hard and exceptional circumstances. The author is however, of the opinion that the principle enunciated by Mac. Cardie J. and the view expressed in the Canadian case deserve approval for the simple reason that emergency, whatever be the varied nature of its gravity - big or small justifies the interference and the aid of the courts and that the meticulous distinctions recognized, by some of the courts in England are unwarranted. It is submitted that to enable the common law to expand, a narrow view is not desirable.

Having examined some of the important English cases it will be of interest to note what solution to the two problems posed earlier on page one have been suggested by the Courts in England. It is important to bear in mind the reluctance of English Judges to change the law though they favour recognizing exceptions to any rule for there is hardly any law without an exception. Mac. Cardie J, in *Prager vs. Blatspiel* (1924) I.K.B. made an observation though obiter which may will be regarded as a salutary warning against over legalistic restrictions. He stated that the common law must meet sets of facts abnormal as well as usual and that it must face and deal with changing or novel circumstances. According to the learned judge authority to act in the interest of his principal is implied in favour of the agent as it is absolutely necessary to maintain and continue the business of

the principal. The circumstances under which an agent has implied authority in an emergency as stated by the learned Judge have already been mentioned. The view of the learned Judge, therefore, is that implied authority to act conceded to the agent is a creation of law recognised to meet the emergency. This view so far as it goes is similar to the Indian law. However, the view of another set of Judges Scrutton and Parker is that exception to the rule should be limited otherwise it will have the effect of eating up the rule itself, accordingly they have confined emergency situation to the Shipmaster and to the drawer of a bill of exchange only.

The question of importance is how far the English or the American Law can be of help in solving some of the problems posed by the language of Sections 189 and 214 of the Indian Contract Act. Readers are referred to the four questions earlier. Regarding the first question as to what is an emergency, a complete answer is in its nature impossible as it is mainly a question of fact. However, the English and American cases disclose a criteria and it is that some unforeseen situation must arise.

The second question is what is the meaning of the term 'saving the principal from loss'. Though no direct answer is furnished to this query nevertheless all decided cases go to show that unless proper step was taken by the agent concerned, the principal would have sustained financial loss in respect of his business or property and the phrase may therefore be

regarded to have been used in this sense.

The third question - which is how to decide whether an agent acted with ordinary prudence as would be done by a person in his own case under similar circumstances. To this the answer furnished is that the agent must act reasonably. If he commits a bonafide, mistake in doing an act, he will still be regarded to be acting properly. This question being mainly one of fact no precise answer can be anticipated. Regarding the fourth question how far an agent is under a duty to communicate an information regarding the changed situation to his principal has been very well answered by the American Restatement in Section 47, and the Commentary added to it and it is suggested that the law embodied in Section 214 Indian Contract Act should be drawn on those lines.

A question posed earlier, how far a stranger can become an agent because of an emergency has been answered in the negative by the English authorities. The doctrine of *Negotiorum Gestio* of the Roman Law has never found acceptance in England. However, there are a few dicta of English Judges and the view of story, a high authority on the Law of Agency whose opinions are now cited in support of the proposition that an agency relationship may be established by an emergency situation in favour of even a stranger.

An important question arises under Section 189 Indian Contract Act whether a stranger can have an implied authority to do certain acts in an emergency. In the view of Justice

story²⁴ the principle applicable in the case of an agent would equally be applicable in the case of a stranger under circumstances of positive necessity; "as for example, in cases of irreparable injury to perishable property, occasioned by fire, ship wreck, inundation; or other casualties, and found without any known owner or agent."²⁵ The stranger performs in such cases the functions of the Negtiorum Gestor of the Civil Law; and it appears that he is justified in performing acts with a view to save the property from complete destruction or even to preserve it and stop its deterioration. Salvors are understood to be clothed with authority; in cases of this kind to dispose of the property saved for the interest of all concerned provided the property be of a perishable nature or if it be unfit to withstand the inclemencies of the weather till the claims in respect of them can be finally decided by a court of law.

In *Kempt v. Pryor*²⁶, Lord Eldon stated as follows :-

"I have a strong conviction upon sound principles, confirmed by my short experience at guild-hall that, if a man under a contract to supply one article supplies another under such circumstances, that the party, to whom it is supplied, must remain in utter ignorance of the change, until the goods are under circumstances, in which it would be against the interest of the other to return or reject them instead of doing what is best for him, selling them immediately, a jury

24. Story-Law of Agency-Art. 142 page 115.

25. Story on Bailments Art. 83.

26. 7 Ves. 240, 241, 242, 247.

would have no hesitation in saying, he ought to be considered, if he pleased, not as a purchaser, but as placed by the vendor in a situation in which acting prudently for him, he was an agent. The consequence there is, that he would be liable to account for the money received, subject to freight and other charges; though while the goods were in transit, he had considered himself owner". Lord Eldon's reasoning stated above gives countenance to the view that a non-agent may be clothed with the rights and responsibilities of an agent when a novel or unforeseen situation arises.

A bailee is already regarded in Indian law to be sharing the rights and responsibilities of an agent in the exercise of his implied authority arising on the ground of an emergency and it would be no wonder, that the area of its application is considerably widened. A day may not be far off when the Judges in India or our legislators deem it proper to include even cases of strangers sharing that authority within the scope of our law.

Having examined at some length the scope of the emergency situations and the circumstances in which an agent has been held to possess an implied authority to safeguard the interest of his principal, it is proposed to consider the policy of the law underlying the rules stated on the subject.

The foregoing analysis of the emergency position has made it amply clear that an agent has a discretion only on the happening of an emergency when he had no reasonable opportunity

to contact his principal and obtain his instructions. That being so, it is obvious that in exercising his discretion with a view to save his principal from loss he is not acting in derogation of any instructions. As a matter of fact, the circumstances having totally changed the earlier instructions have no bearing in resolving the difficulties of the new situation. Two different justifications may be offered for the recognition of the rule that an agent should have a discretion in the matter. One is that under the changed circumstances, there is an implied consent of the principal authorising the agent to exercise his discretion and this contention is strengthened by the fact that the law requires the agent to act as a man of ordinary prudence as if it were his own case under similar circumstances.

In other words the agent is to act in a reasonable manner and not capriciously. Undoubtedly by emphasising this aspect of the agents conduct law ensures that the agent to the best of his ability will try to benefit his principal. There is thus no margin of doubt that the agent's conduct would be one generally acceptable to any principal, except those whose satisfaction is not merely derived from the benefit that is conferred on them but they prize much more the compliance of their instructions irrespective of their merits. Such cases must indeed be rare, for in business the idea of deriving profits is usually the foremost consideration.

Law after all cannot devise means of satisfying the whims and caprices of every individual person. It is meant

to confer the greatest good of the greatest number. The policy of the law, according to the above view, appears to be prompted by the consideration of benefitting principals and at the same time, to enable agents to absolve themselves of any responsibility to which they would render themselves liable if loss ensued to their principals by their negligence or inaction.

The law propounded above, is no doubt open to the obvious criticism which has been levelled against the 'implied term theory' as a justification for the doctrine of frustration of contract.

The second justification for the policy of the law on the subject which may be offered is that since the conditions imposed on an agent subject to which he can exercise his discretion are such as leave no margin for doubt that he will act reasonably and in a bonafide manner it becomes obvious that in the large majority of cases he will be benefitting his principal. As already stated earlier this by itself may make the position acceptable to the principals generally save a few.

The agent in his turn is absolved of the responsibility of being saddled in damages if loss had ensued to his principal by his negligence or inaction.

Law must of necessity employ the principle of give and take in reconciling conflicting interests. The principal foresakes his right of giving instructions, the agent shoulders a greater responsibility as he has to act under various safe-

guards and conditions. Thus does the law reconcile conflicting interests of the principal and the agent in emergency situations. Turning our attention now to the position of the third party we find that the existing law on the subject does not disclose or give encouraging evidence of a sound policy. If an agent acts strictly in accordance with the requirements of section 189 and 214 of the Indian Contract Act or according to the principles elaborated under the common law of England and America, the position of the third party is safe and free from doubt. Doubts regarding the legal position of the third party arise when the agent has acted in an unauthorized manner or in derogation of the rules of law. The third party acting bonafide enters into a contract with the agent assuming that he has authority and performs his part of the Contractual obligation. The question arises whether the third party can successfully bring an action against the principal? Sections 226 and 227 of the Indian Contract Act contain the law relevant to the subject.

A Privy Council case²⁷ has stated interpreting the scope of the above sections that persons who deal with agents whose authority they know are limited, deal with them at their own risk and if the agent exceeds his authority, the principal is not bound.

To the author,^{of} this paper, it appears that the policy of the law is unjustified in placing the position of the third

27. (10) 14 C.W.N. 381 (388) P.C.

party in jeopardy. In an emergent situation it is not at all feasible for a third party to make inquiries whether the agent is acting in an authorised or unauthorised manner. There is neither the time nor occasion for that.

Under such circumstances it is really hard on the third party to deny him a legal remedy against the principal. It may be argued that he has a right of action against the agent. We are aware of the reasons as to why the law has made the principal liable for the conduct of his agent. An important reason is that the third party can easily and safely satisfy his decree against the principal who generally is in a much better financial position than his agent. The third party may reasonably argue that his right of action against the agent is merely illusory.

In some cases a contrary view has been taken, which are stated here.

In a Madras²⁸ case it was held that where an agent did an unauthorised act which benefitted the principal, the principal was bound in equity to return that benefit to the third party from whom he had derived it.

The legal position despite these differing views is not free from difficulty and the author suggests that the existing law may be amended and a clear rule enacted that the third party will have a right of action against the principal

28. A.I.R. 1916 Madras 1025 (1027) D.B. See also A.I.R. 1936 Bombay 62 (66).

in all emergency situations, where he comes to the rescue of the agent, thus benefitting the principal.

Before concluding the discussion of the subject, it will be interesting to note the problems of policy and purpose that underlie the law under consideration. The law is faced with two puzzling problems. They are, first whether the basic principle that an agent can only act when he is expressly or impliedly authorized by his principal so to do can be infringed and second, if the principle above enumerated cannot be altered^{or} modified should another competing principle that the agency relation is meant solely or premarily to benefit the principal be forsaken. The task of formulating a proper policy that could resolve these two conflicting ideologies was by no means easy. In a desperate attempt to reconcile these conflicting principles we find that generally the attitude of the courts in America, at least, has been to recognise that the agent's power to act in an emergency is based on an implied authority. The recognition of this view would certainly put an end to the controversy for then no principle is at stake. The author, however, does not agree with the views expressed in the commentaries added to Sec. 47 of the American Restatement of Agency. The reason is simple. There cannot be in law any implied authority in favour of an agent in respect of a matter which could not possibly be in the contemplation of the principal. The way the law has tried to resolve the conflict is commendable. The agent is only authorized to act in a reasonable manner in an emergency. Since communication with the principal is not practicable the agent is certainly not acting

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in derogation to the known wishes of his principal.

Furthermore, it can be safely asserted that principals generally would be interested in preserving their business and in securing profits the agent is fulfilling that obligation.

The first principle enunciated earlier is therefore not set at defiance but merely modified to suit the peculiar circumstances created by an emergency. The law in attempting a reconciliation of the conflicting principles has succeeded in conferring benefit upon the principal and the agent alike. The principal is benefitted because otherwise his property or interests would be sacrificed. Similarly the agent derives the advantage of getting the necessary authority to preserve them and acquire rights against third persons for his principal and against the principal in respect of his remuneration, indemnity etc. The authority of an agent in an emergency cannot be said to arise from an implication. The author of the paper shares the view of the Australian authority²⁹ which holds that authority in an emergency" is a question of law; the application of the doctrine does not depend on the express or implied consent of the parties. In this fundamental respect agency of necessity differs from true agency". It is well to remember that emergency power is the creation of law. This is something not peculiar to the principal and agency relationship but is generally adopted in various fields of legal relationship. The power vested by most of the consti-

29. G.H. Treitel, 3 Annual L. Rev. of West Australia 1 (1954).

tutions of the world in the head of the State demonstrates this view-point.

RECOMMENDATIONS :

Section 214 Indian Contract Act 1872 to be reproduced and the following illustrations added to it to show the wide range of factual situations covered by the Section.

ILLUSTRATIONS :

1. P, the owner of a small apartment house, on leaving for a fishing trip in the wilderness, directs- A, a friend, to collect the rents during his absence, telling A that he has no one else in charge of the building. During P's absence, fire destroys the house. Not knowing where P is and realising that the insurance on the house will be forfeited unless proof of loss is made. A sends proof of loss to the company insuring the building. A is authorized to do this.

2. P, a peach grower, ships peaches to his factor in the city. Twelve hours before they are due to arrive, the factor learns that in his city, owing to excessive arrivals, peaches will not bring much more than enough to satisfy the freight charges, but that, if diverted to a factor in another city, they will bring a much larger price at no great freight cost. He cannot communicate with P in time to make the change. He is authorised to re-route the peaches and the fact that they are unexpectedly destroyed by flood in the other city does not subject him to liability to the principal.

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3. Same facts as in Illustration 2, except that A did a similar thing the year before and was told by P never to do it again. A is not authorised.

C. If the agent acts reasonably, the fact that he is mistaken as to the necessity of action does not prevent the existence of the authority to act. Furthermore, although he is at fault for the creation of a situation which causes him to depart from the letter of his instructions, he is authorised to act, under the circumstances stated, although he may be responsible to the principal for the expense or loss caused by his prior wrongful conduct.

4. A; ordered by P to ship goods through a specified country, is credibly informed that a revolution is imminent and will probably break out while the goods are en route, and if so that the goods will be seized by the insurgents. The Principal urgently need the goods and the agent cannot communicate with him. He thereupon ships the goods by a more circuitous but nearly as expeditious route. He is authorized to do this even though the revolution does not occur.

5. A, selling agent for P, has been ordered not to sell to T on credit, During P's absence and while he cannot be reached, A sells to T on credit, delivering the goods. He immediately realises that T has obtained the goods by fraud and is about to abscond from the State. A begins an action to replevin and recaptures the goods. He is authorised to do this although he is liable to P for the expenses of so long.

COMMENTS :

d. The fact that it is possible for the agent to communicate with the principal does not prevent his having authority to act if, in view of the nature of the transaction, the expenses of such communication would be disproportionate, or the delay might seriously harm the principal's interests.

ILLUSTRATIONS :

6. On being driven to the train by his chauffeur A, P tells him to take the car to P's summer home to which P is going by train. A asks about having a new timing chain inserted but is told to let no one touch the car. While A is driving as directed, the timing chain breaks and the car will not go without a new chain. A could telegraph to P but at the expense of several dollars and much delay. A has a new timing chain inserted and also has the valves ground, it is a question of fact whether or not A was authorised to have the chain replaced. He had no authority to have the valves ground.

CHAPTER IVAGENT'S IMPLIED AUTHORITY TO DELEGATE

The purpose of this chapter is to examine the problem of delegation by an agent, from an entirely new angle and in that light to suggest certain improvement in the Indian Law embodied in sections 190-195 of the Indian Contract Act.

Freedom of Contract is so far the recognised rule; but a few departures from it have recently gained currency. In the industrial sphere, freedom of contract is increasingly subject to restraint. Hours, wages, conditions of labour and annual leave are controlled by law. The author of this thesis offers a new thought that an agent has a competing interest against his principal in the matter of delegating his authority to another. Principals, generally, are interested in requiring their agents not to delegate their functions to another, whereas agents for various justifiable reasons desire to delegate their authority to others. There is thus a clear clash of interest between them and a case will be here made out that the interest of an agent needs protection. It appears that an agent has been regarded merely as a dignified servant and for this reason, the recognition of his interest has been relegated to the background. This approach, the author believes is a fallacy.

The justification for presenting this thesis is to attract the attention of law givers and legislators to the imperative need of change in the existing law prompted by the needs of a changing society where values are fast undergoing transformation. The author is of the opinion that the entire law on the subject has to be reviewed, the fallacy exploded, and suitable amendments introduced in the Indian Law.

It must be made clear at the very out set that the author proposes to examine mainly the Indian Law but references to comparative English and American Law will be made wherever it is deemed necessary to support his view point.

It is a well known rule of law that an agent ordinarily has no authority to delegate his functions to another. The familiar Latin maxim expressing this thought is delegatus nonpotest delegare.

In India the rationale of this principle has not been elaborated in any court decision, though we find specific mention of the rule in Section 190 of the Indian Contract Act. The words "undertaken to perform personally" occurring in this Section indirectly suggest that an agent has no power to delegate his duties to another for the obvious reason that he undertakes to perform them personally. The basic reason for such a rule has been stated in the words of Justice Story. "It lies in the personal trust and confidence reposed in the particular party."¹ In English Law the rule and its rationale

1. Story, S. 13.

have been admirably stated by Thesiger L.J. in *De-Bussche v. Alt*² :

"As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third party; but this maxim when analysed merely imports that an agent cannot without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that in as much as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract". In an American case *Washington Trust Co. v. Bishop*³, the court has justified the maxim in these words: "The relation (of attorney and client) thus created is one of the utmost trust and personal confidence. Where an agency of such character exists, requiring as it does the exercise of special knowledge, judgment and discretion, it is generally held that the agent may not delegate the performance of his duties in the matter without express authority from the principal unless such authority is necessarily implied for the proper execution of the agency. This rule, which is so fundamental as to require no citation of authorities, does not apply if the delegated act is ministerial only". This was a case between an attorney and a client where the degree of skill or confidence was much greater than in an ordinary case of principal and agent. But the difference lies only in the degree

3. 75. R.I. 157. 80A (2d) 185 (1951).

and not in the nature of the relationship⁴. It can therefore be stated with impunity that, as the relation of principal and agent necessarily implies a certain measure of trust and confidence reposed in an agent by his principal, an agent cannot be permitted in law to delegate his duties to another for that will have the effect of defeating the very purpose and intendment of the principal and agency relationship. To this rule, in both England and America certain exceptions have become firmly established. So it is in India where the entire statutory treatment of the subject is found in Sections 190 to 195 of the Indian Contract Act.

To understand these exceptions it is first important to note a distinction that has often proved confusing. This lies in the contrast⁵ between (1) a person appointed by an agent to act in the capacity of his own agent and (2) a person selected by the agent to become an agent directly of the original principal. Only the former can be correctly described as a sub-agent. This is well put in the American Restatement of Agency, where it is said: "A Sub-agent is a person to whom the agent delegates, as his agent, the performance of an act of the principal which the agent has been empowered to perform through his own representative".⁵

4. Almost the same language is used in a non-lawyer case of principal and agent : *Mc Kinnon v. Vollmer*, 75 Wes 82, 43 N.W. 800 (1889).

5. Sec. 5 Restatement of Agency first Edition. See also Seavey, "Subagents and Subservants" 68 Harv-L. Rev. 658 (1955).

Fortunately, there is a decision in the Calcutta High Court⁶ that throws helpful light on the Indian view of this distinction. In that case, Negi purchased from a firm C at Calcutta a quantity of corrugated iron sheets and paid a sum of Rs.250 in part payment. Negi instructed the firm to send the money and collect the balance through the local Bank of Khulna. The firm C therefore sent the goods to Khulna and directed the Railway Receipt, their bill and demand draft with covering letter to the National Bank their bankers of Calcutta, instructing them to collect the bills through the Bank at Khulna. Contrary to instructions the Bank made over the goods to Negi, who delayed payment and later offered to pay in instalments. Whereupon the firm C brought a suit to recover the balance from the National Bank in Calcutta. The Judge stated: "I think that Sections 194 and 195 (of the Contract Act) are to be read together and the authority to create a third person an agent of the principal referred to in Section 195 connotes that the agent has a discretion in selecting such agent for his principal. These sections do not apply to cases where the agent has no power of selection. If he undertakes the agency is compelled to appoint a particular nominee of his principal as the agent of his principal for some part of the business of the agency . . . Now, it is common ground that the defendant Bank did appoint the Khulna Bank to carry out that part of the collection which was to take place at Khulna but the question to be decided is whether

6. Choudhury T.C. and Bros. v. Ginndra Mohan Negi A.I.R. 1930 Calcutta 19 per page J.

the defendant Bank appointed the Khulna Bank so to act as the sub-agent of the defendant Bank or as the substituted agent of the plaintiffs".

Proceeding further the Judge said "that the question is whether the defendant Bank created privity of contract between the plaintiffs and the Khulna Bank. In my opinion, that is the true test to determine whether the person appointed by an agent authorized in that behalf to perform part of the business of the agency is a substituted agent of the principal or the sub-agent of the agent, and that the test to be applied is the same whether the case falls within Sections 194. or whether, as in the present case the person so appointed is the nominee of the principal . . ."

After distinguishing between cases where an agent names an agent of his choice and where he merely carries out the order of the principal the Judge stated: "I am of opinion that, while the letters and telegrams to Khulna Bank were sent by the defendants Bank, the mandates therein contained came from the plaintiffs. As I apprehend the facts, in endeavouring to carry out the collections of the bills at Khulna, the Khulna Bank was not acting under the control of the defendants Bank, for, so far as the collection at Khulna was concerned, the defendant Bank was acting under the direction of the plaintiff who throughout took charge of the transaction. The defendant Bank, in my opinion, was the conduit pipe through which the plaintiffs communicated their instructions to the Khulna Bank ..."

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referred to the Khulna Bank as "our Khulna agents ... But undue stress ought not to be laid upon loose or casual words and phrases used in business letters and regard must be had to the substance of the transaction . . ."

The importance of this case lies in its clear statement of two criteria for determination whether a person named by an agent is a substituted agent of the principal or merely a sub-agent of the agents: First, there must be privity of contract between the principal and the person named by the agent to perform part of the business of the agency; and second, the control of the activities of the person so appointed must be vested in original principal.

If the facts disclose compliance with these two requisites the appointee will be deemed to be a substituted agent, having the same status and rights towards the principal as the original agent; if otherwise, he will be a sub-agent of the agent.

Another important case on the difference in the scope of sections 190 and 194 is B. Mohindra Dass v. P. Mohan Lal⁷ and another. There the plaintiffs, owners of the houses in question in Mussoorie, appointed plaintiff 2, a banking concern their agents to lease out his houses. During correspondence the owner wrote to the bank as follows." In any case you need not inquire from me about renting of cottages. You have full authority to accept anything." The banks thus appointed

7. A.I.R. 1939 Allahabad, 186 per Mohammad Ismail J.

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The following passage states the governing principles" "... it would appear that plaintiff had given very wide powers to plaintiff 2 and the power to appoint an agent under these circumstances may well be inferred. A banking concern usually is not expected to go about in search of tenants and plaintiff 1 must have known that the agencies will have to be employed in order to find suitable tenants for the three houses entrusted to plaintiff 2 who had authority to appoint defendants agent and the latter are accountable to plaintiff 1." The Judge apparently based his conclusion on the fact that plaintiff 1 regarded the defendants as his agents and not as sub-agents of plaintiff 2. Thus the Court must have regarded the defendants as agents of plaintiff and not as sub-agents, thus bringing the case within the purview of Section 194 instead of Section 190 of the Indian Contract Act. The former provides: "where an agent holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him."

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However it is suggested that the case should not have been brought within the purview of Section 194. This section is only applicable when the principal either expressly or impliedly authorizes his agent to name another agent for some part of the business. In the correspondence, that passed between the principal and the bank the language already quoted above would seem only to show that the principal reposed full confidence in the bank for the fixation of rent, on the other hand, it would seem improper to construe it to mean that the principal authorized the bank to name another person as an agent. It is to be regretted that the attention of the Court was not drawn to the Calcutta case discussed earlier. The principles laid down in that case, if they were applied here would undoubtedly warrant a contrary conclusion, for it was there stated that ". . . Undue stress ought not be laid upon loose or casual words and phrases used in business letters and regard must be had to the substance of transaction . . .". There is nothing in the evidence here which gives countenance to the view that privity of contract was ever established between plaintiff 1 and the defendants.

The bank could hardly be expected to go about in search for persons willing to take cottages for a reasonable rent and so it would seem proper to infer that it was authorized to appoint a sub-Agent within the purview of Sec. 190. But it is quite another matter to infer authority to appoint a person to become an agent holding directly from the original principal. Thus we are of the opinion that the defendants really were sub-agents rather than agents. It is therefore suggested that in this respect, the decision was in error.

This distinction has been well brought out in a decision by the Sind High Court⁸. The Judge was commenting on the following except from Halsbury's laws of England⁹. There are three classes of sub-agents "(1) those who are employed without the express or implied authority of the principal, and consequently by whose acts he is not bound, (II) those who are employed with the express or implied authority of the principal but there is no privity of contract between him and that sub-agent, (III) those who are employed with the principal's authority between whom and the principal there is privity of contract and consequently a direct relationship of principal and agent is established between them.

"For the acts and defaults of the first two classes of "sub-agents" the agent is responsible to the principal. In the case of the sub-agent of the third class, his rights and

8. A.I.R. 1930 Sind 247 at p. 251.

9. at page 373 of Halsbury's laws of England, Vol. 1, the position of sub-agents of different kinds has been very succinctly and clearly stated as follows : "There is as a general rule, no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer, the agent. The exception is where the principal was a party to, and adopted his acts, and it was the intention of the parties that privity of contract should be established between them. There may, therefore be said to be three classes of sub-agents: (1) those employed without ~~an~~ the authority express or implied of principal by whose acts the principal is not bound; (2) those employed with the express or implied authority of the principal between whom and the principal there is no privity of contract; (3) those employed with the principal's authority between whom and the Principal there is privity of contract. For the acts and defaults of the first two classes, the agent is responsible to the principal".

liabilities are those of an agent and therefore it may^{be} rightly pointed out that the use of the word sub-agent is not happy. It would have been better if substituted or co-agent was employed instead of sub-agent, for the simple reason that where there is a direct privity of contract between a principal and another person, he is really an agent and cannot properly be called a sub-agent for the reason already indicated in the Calcutta decision.

The Judge then compared the Indian and English Law on the subject in these words : "Sections 190 to 192 deal with sub-agents properly so called and which are referred to as classes (1) and (2) in the passage quoted above from Halsbury's laws of England. Section 190 declare that an agent may not delegate to another person the performance of an act which he had expressly or impliedly undertaken to perform personally unless permitted to do so by the custom of trade or the nature of the agency.

Section 191 limits the definition of a sub-agent to one who is employed by an agent and is required to work under his control. S. 192 inter alia declares that notwithstanding the appointment of sub-agent as defined in the previous Section the agent shall continue to be responsible to the principal for the acts of the sub-agent and that the sub-agent will in his turn be responsible to the agent. In effect this Section contemplates that in such a case a privity of contract is not established between the principal and the sub-agent in consequence

merely of such appointment been made.

Section 194 deals with the third class of sub-agents referred to in the passage of Halsbury but provides that such a person is not a sub-agent within the definition of S. 191, that is to say a sub-agent properly so called and that he is thereby deemed to be an agent of the principal and directly responsible to him. In this case a privity of contract is ipso facto established between the principal and the person so named."

An interesting question of a different nature may be raised from the language of Section 191 of the Contract Act. It will be recalled that this defines sub-agent as "a person employed by and acting under the control of the original agent in the business of the agency." It is worth noting that since an agent has power to appoint a sub-agent who works "under his control" it is possible to visualize cases where he may appoint a servant instead of an agent. Courts in England, America, and India have stated that a main point of difference between an agent and a servant lies in the great amount of discretion reposed in an agent whereas a servant acts under the immediate right of physical control of master. The use of the words "acting under the control of" in section 191, appears to permit the interpretation that the appointment of a servant is altogether feasible within the language of that Section. But it would be dangerous to carry this interpretation too far; to contend that is, that Sec. 191 not only permits but requires that the appointee be the agent's servant. In fact, the language of Section 182 defining an agent as a "representative" with its

rejection of all use of word "control", lends some small support to this.¹⁰ Passing the obvious reply that the statute expressly names the appointee a "sub-agent" rather than a "sub-servant" the really important answer lies in the dual uses of the word "control". Whereas it may relate to the physical means whereby a servant performs his works, it can also relate to the more subtle control over the contract making power of an agent and over the manner and guise of his representation of the principal. Certainly too, the language of section 192, regarding the powers of sub-agents as to third person is couched in agency terms, not those of service. Thus, the sub-agent "represents" the principal who is now "responsible" for his acts as if he were an agent." It would seem clear, therefore, that while the agent's appointee may become the agent's servant, there is little in the language and nothing in principle that requires it. Thus, in conclusion, the appointee may, and in all probability will, be an agent rather than a servant.

Whether a person appointed by the agent to a direct relation to the principal rather than as a sub-agent may also in the alternative become either an agent or a servant of the principal is open to similar set of comments. Section 194 deals with this question and, as in other Sections, uses only the word "agents". However, it is believed that this appointee also may be of either category and that the answer will be found in the nature of the subject-matter of the control that the principal has now acquire and in the degree of representation rested in the appointee.

10. Section 182 of the Indian Contract Act 1822, reads thus: "An agent" is a person employed to do any act for another or to represent another in dealing with third person. The person for whom such act is done or who is so represented, is called the principal.

Unhappily, no Indian decisions have been found bearing on either of these last two questions.

Exceptions to the general rule of non-delegation have become well established, as has been said both in England and America. Bowstead states the English¹¹ Law thus : "No agent has power to delegate his authority or to appoint a sub-agent to do any act on behalf of the principal". He then lists six exceptions which may be briefly summarised as comprising cases where (1) there is reasonable usage, in the trade (2) the principal knows in advance of an expected delegation, (3) a mutual intent to delegate may be presumed, (4) an unforeseen emergency creates a necessity. (5) delegation is necessary for execution of the authority and (6) the authorised act is ministerial.

An excellent judicial summation of the occasion for implying an authority to delegate is found in an opinion by Thesiger, J., *De Bushe vs. Althack* in 1878¹². "... the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on one hand, to enable the agent to appoint what has been termed a "sub-agent" or

11 . Bowstead "Law of agency" (12th Ed. 19-) art. 41 this authority is well supported by a substantial array of English decisions.

12 . (1878) 8 Ch. D. 286, 310). See also *Quebec Ry. v. Quinn*. (1858) 12 Moo P.C.C. 232.

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"substitute", and on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists and is duly exercised, privity of contract arises between the principal and the substitute and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him as if he had been appointed agent by the principal himself".

In the United States the most comprehensive treatment of the authority to delegate is found in the Restatement of Agency (2d. Ed.) Four occasions for interferring an authority of an agent to appoint another person as agent of the Principal are enumerated in Section 79, and five for inferring an authority to appoint a sub-agent set out in Sec. 80.¹³

13. Sections 79 and 80 of the Restatement of Agency

Second are here reproduced.

79. When authority to appoint an agent is inferred.

Contd....

The function of the American Restatements (for there are many now completed) is "to state clearly and precisely in the light of the decisions the principles and rules of law". The field of authority to delegate is no exception and an examination of decisions in that country will amply support the propositions set forth in the Sections of the Restatement of

14. Continued ...

Unless otherwise agreed, an agent is authorised to appoint another agent for the principal if :

(a) the agent is appointed to a position which in view of business customs, ordinarily includes authority to appoint other agents; or

(b) the proper conduct of the principal's business in the contemplated manner reasonably requires the employment of other agents; or

(c) the agent is employed to act at a place where or in a business in which it is customary to employ other agents for the performance of such acts; or

(d) an unforeseen contingency arises making it impracticable to communicate with the principal and making such an appointment reasonably necessary for the protection of the interests of the principal entrusted to the agent.

80. When Authority to appoint a subagent is inferred.

Unless otherwise agreed, authority to appoint a subagent is inferred from authority to conduct transaction for the principal for the performance of which the agent is to be responsible to the principal if :

(a) the authorised transaction cannot law-fully be performed by the agent in person :

(b) the agent is a corporation, partnership of other organization.

(c) the business is of such nature or is to be conducted in such a place that it is impracticable for the agent to perform it in person.

(d) the appointment of subagents for the performance of such transaction is usual, or the principal has reason to know that the agent employ's sub-agents; or

(e) an unforeseen contingency arises in which it is impracticable to communicate with the principal and in which such an appointment is necessary in order to protect the interests of the principal entrusted to the agent.

agency dealing with delegated authority, and with the various exceptions to the generally accepted rules.¹⁴

In India, our contract Act expressly provides two exceptions. These are found in the same section (190) that asserts the general rule of non-delegation. The first of these describes a case where "by ordinary custom of trade a sub-agent may be employed;" the second deals with a case where, "from the nature of the agency, a sub-agent must be employed", note that the first depends on a trade custom, rather than a non-commercial custom and that the second would seem to describe a case of implication from necessity. More important, note that both instances, relate to the appointment of a sub-agent, "a person acting under the control of the original agent" (by Sec. 191) rather than of one designated by the agent to become an agent of the principal.

On comparison with the English exceptions noted by Bowstead these Indian Illustrations would seem to fall within at least numbers (1) and (5). As for the American Restatement they will be found under Sec. 80 (a) and possibly (c) and (e) respectively.

14. "authority to delegate delegated powers ~~to~~ is found by implication from the extent and general nature of the business in the original authorisation" and this may be so even where the agents duties involved "the exercise of personal skill and judgment" if they "require the services of sub-agents". Insurance Co. v. Thornton, 130 Als. 222, 30 So. 614 (1901) For general discussion of American cases see Philip Mechem, "outlines of agency", 4th ed. 19 see etseq.

Unfortunately only one decision has been found interpreting the exceptions enumerated in Sec. 190. This is the case of *Lai Book Syndicate vs. Finlay Fleming & Co.*¹⁵ and turns upon the application of the second of the two: necessity. In that case the Syndicate plaintiff-appellant, located in India, had appointed the respondents, Finlay Fleaming & Co., also in India as their agents to sell wolfram in England during World War I. The respondents in turn appointed Hems Milne & Co., also in England as sub-agents to do this work. Referring to Sec. 190 of the Contract Act the High Court of Rangoon stated "The respondents have no London Business house, and from the nature of the agency it is manifest that, in order that they sell wolfram in time of war, they would have to appoint a sub-agent in England. Apart from this, purchasers at that time would have been (Chary) of entering into contracts with a foreign principal, because of the difficulty of suit and other matters. We hold that there was authority to appoint a sub-agent to sell the ore, and that it cannot be held that the respondents contracted to sell the ore personally".

Certain sections of the Indian Contract Act invite a further comment. This relate to the contrast between the relations of (a) the parties as among themselves and (b) as to third persons of the three individuals, who make up the relation itself, principal, agent and appointee, it will be recalled that the latter may be either an agent or a sub-agent of the principal. Sec. 192 deals with cases where the agent has acted

15. A.I.R. 1923 Rangoon 84.

within his proper authority; it sets out the rights of the parties both inter se, and as to third persons. Section 193 however, is concerned with unauthorised appointments by the agent and it too deals with both the internal rights of three original parties and the rights of outsiders with whom the appointee has dealt. These sections recognize that the relation of principal, agent and appointee inter se may not be the same as when a fourth person is introduced into the situation. They apply this distinction to each of the primary relations, when the agent was within the authority and when he was not.

In the former, the principal is bound by the appointee's acts "as if he were an agent originally appointed by the principal" (Sec. 192). Whereas in the latter only the agent is bound; the principal is not bound to the fourth person "nor is that person responsible to the principal" (Sec. 193). Thus do the contracts of an authorised sub-agent obligate the principal while those of the unauthorised fourth person bind only the agent.

One small item remains where an agent is choosing an agent for the principal, as distinguished from a sub-agent, the contract act imposes on the agent duty of ordinary care in making the selections: only if he exercises this he protects against liability for negligence by the appointee (Sec. 195).

Unhappily, there appear to be no reported decisions bearing on these distinctions. They are, however, reasonable and entirely consistent with the common law of agency.

In summary it may be said that under both American and English Law the general rule of non-delegations is recognised but that in each of these countries there are equally well established exceptions. As has been seen, the Indian law as expressed in Sec. 190 of the Contract Act recognises the same general principle. The exceptions, however, are more specifically expressed and are strictly limited to two by the language of the Act. One of these, it will be recalled ^s in "when permitted by custom or usage" and the other "where from the nature of the agency a sub-agent must be employed".

However, it would seem entirely permissible to infer from Section 190 a further instance of implied authority to appoint a sub-agent. This derives from the general principle of non-delegation as expressed in the opening sentence: "an agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally". Acts which have not been so undertaken clearly are not within the statement. In other words, they are not in a true sense exceptions, but more accurately are not covered at all by the phrasing of the Act. Certainly any Act of ministerial character, not requiring the exercise of skill or involving personal confidence would fall within this category. Other sources of implied authority of an agent to appointⁿ a sub-agent under English or American Law deriving from apparent or incidental authority are certainly not covered by the language of Sec. 190. However it is the author's opinion that such authority in an agent may be implied according to certain other sections of the Indian Contract ' .

Thus, Section 187 recognises authority "to be inferred from the circumstances of the case" and includes "things -spoken or written, or the ordinary course of dealing" among such circumstances. Sec. 188 expands still further this area of implication by including an act "necessary to do" the act expressly authorised, and where the agent's authority is "to carry on a business" he has also authority to do what is necessary for the purpose, or usually done in the course, of conducting such business". Finally, Sec. 189 recognizes an authority to be inferred from an emergency. These three Sections relate to an agent's authority generally, they are not restricted as are Sections 190-195, to the problem of delegation. They enumerate a series of occasions for inferring authority in the case of all agents. It will be contended that an agent who has been given authority to appoint either a sub-agent or another agent is not thereby deprived of the statutory authorities that would otherwise be his.

The difficulty with this position lies in the fact that Section 190 sets up the general rule of non-delegation and then creates expressly two exceptions. It would seem doubtful whether the general sources of implied authority can be used to expand these exceptions and to include new ones.

Unfortunately, there are no cases in India which throw any light on these views. It must, however, be pointed out that the development of this interpretation by the author that recourse to Sections 187 - 189 can be had for expanding the

grounds of exceptions stated in Section 190 to the rule of non-delegation is problematical because of the uncertainty of whether the courts will rely upon these other sections of the contract Act in case they have concluded that the authority is not to be found in Section 190.

The author, however, offers the following reasons for expanding the exceptions already stated in Section 190, by recourse to other Sections, namely Sections 187-189 of the Act :-

(1) It is a well known rule of construction of statutes that when there are some sections in it which are specific or of limited scope the general section must give way to the more specific on a particular matter. But this rule is applicable only when they overlap in their scope. (2) Sections 190 I.C.A. deals specifically with the implied authority of an agent to appoint a sub-agent under two different circumstances already discussed before. Section 187 to 189 deal generally with the implied authority of an agent to do certain acts on the ground that such acts can be performed because the circumstances of the cases permit it within the purview of Section 187 or that the acts are the outcome of his incidental authority within the meaning of Section 188 or that they can be done with justification on the ground of an emergency (3) Sections 187 to 189 deal specifically with the subject of implied authority of an agent, and since trade usage or custom of the trade is not mentioned in either of the earlier sections (187 to 189), it was presumably thought necessary by the framers of the Indian Contract

Act, in the opinion of the author, to be specifically mentioned as a ground of implication. The second ground of exception in Section 190 which authorises an agent to appoint a sub-agent is "where from the nature of the agency a sub-agent must be employed". The language of the exception clearly lends support to the view that an agent has no option in the circumstances of the case but to appoint a sub-agent. Considering the language of the exception to that of section 188 we find that whereas the circumstance contemplated under Section 190 are such that make the appointment of a sub-agent indispensable, under Section 188 the language does not suggest such an extreme necessity, but a necessity which may be 'usual'. The difference between the two positions though not marked is appreciable. Necessity is the touch stone of both the cases but under section 190 there is no option whereas under Section 188, authority though justified has not the element of being imperative or indispensable in the sense that the whole business in hand would collapse. (3) Even if the difference pointed above may not be clear enough none the less it justified the framers of the Act to mention it as an exception in Section 190 for avoiding any chance of difficulty which might arise on account of a different interpretation being put of the relevant Sections of the Act.

(4) The grounds of the exceptions mentioned in Section 190 are, it is submitted cover an entirely new field from those to be found in Sections 187 - 189; for these reasons it is submitted that on a fair construction of the Sections it will be

proper for the Courts wherever any case comes before them for decision to extend the grounds mentioned in the above Sections as supplementing Section 190. The author believes that it is desirable to liberalise some what the occasions when an agent will be deemed to have authority to delegate. Certainly the courts in America and England have long since been of this opinion. Since the two exceptions to the rule of non-delegation, plus the instance of a ministerial act (which is not a true exception), at present comprise all the occasions when it is clear that an authority to delegate can be found, and since there is at least a reasonable doubt whether the courts will engraft others by recourse to Sections 187 - 189 of the Contract Act, it is therefore suggested that Section 190 of the Act be amended to recognize expressly the other exceptions now so well established elsewhere. The author tenders a tentative language for the proposed amendment. The author however, feels that before the amendment is finally adopted by the legislators, far more study of foreign authorities will be necessary. Undoubtedly the matter merits legislative action and in finally preparing the language of a proposed amendment it is suggested that examination be made of the court decisions in other common law countries, of such legislation as they or their separate states may have adopted, of the writings of scholars such as Floyd R. Mechem, Phillip Mechem and Warren Seavey in the United States of America, of Bowstead and others in England, and particularly of the American Restatement of Agency, for that is itself the scholarly product of an aggregation of common law decisions. The following is the tentative language for Section

190, proposed to be amended. "No agent has power to delegate his authority or to appoint a sub-agent to do any act on behalf of the principal, except with the express or implied authority of the principal. The authority of the principal is implied in the following cases :-

(1) Where the employment of a Sub-agent is justified by the usage of the particular trade or business in which the agent is employed.

(2) Where the principal knows, at the time of the agent's appointment, that the agent intends to delegate his authority.

(3) Where, from the conduct of the principal and agent, it may reasonably be presumed to have been their intention that the agent should have power to delegate his authority.

(4) Where, in the course of the agent's employment, unforeseen emergencies arise which render it necessary for the agent to delegate his authority.

(5) Where, the authority conferred is of such a nature as to necessitate its execution wholly or in part by means of a deputy or sub-agent.

(6) Where the act done is purely ministerial, and does not involve confidence or discretion.

(7) Where, from the circumstances of the case, it appears reasonable that the agent may employ a sub-agent in the best interest of the principal.

The tentative recommendations suggested by the author for amending the Indian Law, remain to be examined from the view point of safeguarding the competing interest of an agent as against his principal. It has to be seen how far they affect a happy compromise between the competing or differing interests of the principal and the agent. The rule of non-delegation obviously is based on the principle that a Principal must get the benefit of the undivided attention and services of his agent for the cogent reason that he relies on his skill, judgment and honesty. While a complete departure from the rule would be fatal to the interest of the principal, law must attempt to affect a happy compromise between the competing interests.

For various justifiable reasons, an agent may not be able to spare his full time to undertake the work of his principal as he has his own problems. By way of illustration a few instances may be taken. A busy advocate or an engineer may have various engagements and it is not feasible, in most cases, for him to undertake the work of one of his principals alone to the exclusion of the others, without delegating his authority to others. Law should in such cases effect a compromise by permitting the employment of other advocates to work under him subject to his general supervision and control, and in the case of an engineer to employ another engineer or overseer under similar safeguard. Agents who are non-professionals or non-technicians may have similar problems of their own, and have an equally good case for delegation of their authority to sub-agents.

An objection regarding the case here made out by the author that an agent's competing interest should be protected may be noted. It has been said by important jurists that every individual interest need not be recognised and that in many cases one interest may be preferred over another. This objection, as it is, is no doubt true. But a critical study of the Jurisprudence of interests written by eminent jurists clearly show that in every society in any country at any given period, law has taken note of the prevailing values recognised then by the society and in the light of that has tried to resolve conflicting interests. India to-day has a socialistic pattern of Society and it therefore appears that there is now a reasonable case for recognizing the interest of an agent. Judging the question from the well known principle of 'business convenience' and needs of commerce which must be regarded as the guiding test in Commercial Law; recognition of the competing interest of an agent also appears desirable.

In post independant era in India the success of any business enterprise is largely due to the drive, initiative and cooperation of agents, and therefore the role of agents should be appreciated and due regard must be had in protecting their interest as otherwise, business must suffer. There is a growing consciousness to-day that freedom of contract may be controlled by law and affect has been given to it in the industrial sphere. By protecting the interest of an agent, the following main benefits accrue :-

- (1) In India to-day there is dearth of skilled professional people and by permitting delegation

many businessmen (principals) would be benefitted and not merely one alone.

(ii) The public is benefitted in two ways :-

(a) it provides greater employment (b) more people can have the benefit of services or advice of skilled professionals.

The modern trend of thought in most progressive countries is that by recourse to higher principle protection should be offered to the economically weaker classes and this principle may well be extended in the present case.

It may be recalled that the various exceptions recognized to the rule of non-delegation in England or America have considerably improved the agent's position, nevertheless the author is of the opinion that the thesis here presented has never been the reason of recognising these exceptions and by recourse to this theory it may be possible to add many more exceptions to those already made.

CHAPTER VAGENT'S IMPLIED AUTHORITY DERIVED FROM
USAGE OR CUSTOM OF TRADE

The Indian Contract Act, 1872, contains no provision expressly relating to custom or trade usage as a source of implication of authority. On the other hand, there are two Sections which bear by indirection on this issue. Sec. 1 contains a broad generalization as to all contract terms, to the effect that nothing in the Act shall affect 'any usage or custom of trade'. A decision of the Privy Council¹ has indicated that the effect of this clause has been to leave custom and usage entirely to the realm of judicial decision. Since the contract Act applies to contracts of agency as much as to any others, the effect of both the language itself of Section I and of its interpretation would seem to be to leave custom and usage as a source of authority fully as undealt with by legislation as in all other cases of implied contract terms.

There is, however, another section of the Contract Act² that bears somewhat more directly on these conclusions. This deals with the relation of principal and agent inter se, rather than with an agent's authority to obligate his principal in

1. Irrawaddy Flotilla Company et. 18 Calcutta 620 at 626.

2. Sec. 211.

dealing with third parties. In setting out an agent's duty to his principal, the statute takes account of custom in this respect; it obligates the agent to conduct his principal's business "according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business", and makes the agent liable for loss in the event he "acts otherwise".

This clearly introduces custom directly into the relationship and it would be logically difficult to assert that this provision does not authorize an agent to do as to third persons what it obligates him to observe for his principal, nor is this conclusion irreconcilable with the effect of Section 1 of the Act. The two sections taken together, assert that the Act is to have 'no effect on custom or usage of trade' (Sec. 1), but that 'custom shall govern between the parties and therefore by necessary implication, must become an authority as to third person. Surely thus, to recognize custom in Sec. 211 is to say affirmatively what Sec. 1 says negatively. It should be observed in passing that 'usage of trade' is an item not to be effected under Sec. 1, but is not preserved as part of the agent's obligation in Sec. 211. It becomes relevant then to determine what meaning the courts have given both of these terms.

The essential attributes of a custom are³ :-

- (i) it must be immemorial; (ii) it must be reasonable;
- (iii) it must be continuous without any interruption, and

3. Paragraph 299 - Halsbury's laws of England, 3rd Edition, Vol. II, page 160.

(iv) it must be certain in respect of its nature, generally, as well as in respect of the locality where it is said to obtain and the person whom it is intended to affect.

The characteristics of a trade usage⁴ are that it should be notorious, certain, and reasonable, and it must not offend against the intention of any legislative enactment.

So far as the requirements of a general custom are concerned, the Indian and the English law are in complete accord. The Indian Law, however, is different in respect of the concept of trade usage from the English Law. The Privy Council stated in an Indian case⁵ that ". . . the evidence of mercantile usage. To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom . . ."

While the English Law emphasises, the element of notoriety as an essential attribute of a trade usage, the Indian law does not consider it necessary for its existence.

A critical examination of some of the leading Indian cases will be helpful in analysing and appreciating the scope of the subject.

An important case in point is Juggomohan Ghose (Appellant) versus Manik Chand and Kaisree Chand (Respondent)⁶.

There, the appellant brought an action against the respondent

4. Paragraph 343 - Halsbury's laws of England, 3rd Edition, Vol. II, page 184.

5. 7 M.I.A. 263 - Juggomohun Ghose v. Manik Chand & Kaisree Chand.

6. 7 M.I.A. 263.

upon three distinct contracts which were in the nature of a wager between them. They related to the average price of opium at the first Lelaum or Public sale by the Government for the year 1846. These contracts were known as Tajee Mundee Chittees, and were, with the exception of the dates and sums, couched in similar terms. The plaintiff stated in his declaration that the defendants had undertaken in consideration of Rs. 500/- that were paid to them, that if the average price per chest of Patna Opium at the next ensuing public sale rose above Rs. 1,300/-, they would pay him such excess or difference within a reasonable time after the said sale. It was found as a fact that the average did exceed Rs. 1,300/- per chest and that the sale had taken place on the 7th December, 1846. The defendants had not paid the difference as stipulated and hence the suit. The plaintiff claimed the principal sum due them. The liability in respect of this sum was not disputed, but payment of interest which was also claimed was challenged by the defendants. The plaintiff set up an usage or custom of trade to pay interest on overdue obligations, but the trial court was not satisfied with the state of the plaintiff's proof and directed a verdict for the principal sum only. On appeal, the Privy Council stated "It remains now to consider the other ground on which the plaintiff relied, the evidence of mercantile usage. To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of Custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appears to be

so well-known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. "The Privy Council concluding that the plaintiff's evidence while inconclusive, was sufficient to require explanation directed a new trial.

The importance of this case lies in the clear statement made that for a mercantile usage in India notoriety is not an essential ingredient. The reason is obvious, for in India when the Indian Contract Act was enacted, trade and Commerce, were in their infancy, and it would be fatal to the growth of mercantile usages, if such an ingredient was insisted upon as an essential element of it; though in England, we find that the courts insist upon notoriety as an essential element of mercantile usage. The case is equally important in the sense that it points out the requirements of usage of trade.

In another important case⁷, the plaintiff's firm, which was carrying on business in groundnut oil entered into two contracts with the firm of the 1st defendant for the purchase of this oil at the rail road station in Guntur. The plaintiff in his plaint relied on a trade usage in the ground nut oil business that in contract of sale, the seller, if he were outside Guntur, had to take empty drums from the buyer at his own expenses, fill them with oil and bring them to Guntur Railway Platform, weigh them and take the contracted price for the quality of oil supplied. It was also stated in the plaint

7. The Hind Mercantile Corporation Ltd. Plaintiff-appellant v. Mirgula Vinkateshwarah and Co. & others; Defendants-respondents, A.I.R. Andhra Pradesh, 545.

quoted. ". . . the words Pakki Adat have no magical efficacy in themselves. They are no more than a compendious description of a body of local usages which vary from market to market. "The court further observed that any body setting up such a local usage must allege and prove the incidents of that usage. Giving an idea of the trade usage of Pakki Adat the Court observed that Commission agents in Karachi are in the habit of dealing on their own account in the business of the agency, without the knowledge and consent of their constituents. The High Court, however, was of the opinion in the case that the evidence of one man and he too the Gomasta of the plaintiff was wholly insufficient to establish the existence and legal validity of a custom admitted to be at variance with the ordinary law of principal and agent. It is important to bear in mind an observation made by the High Court that a usage of this kind being both illegal and unreasonable would not be binding on a principal not proved to have known it and agreed to be bound by it according to English Law.

The High Court, however, pointed out that there was some difference between the Indian law as laid down in Sec. 215 Indian Contract Act and the English Law and observed that the Court will require strict proof of such a usage and only then give effect to it. The importance of the case lies in a clear differentiation that has been pointed out between the English Law and Section 215 Indian Contract Act that a usage which is regarded as illegal and unreasonable can be upheld in India provided any party alleging it can prove its existence

by clear and unequivocal evidence. Some observations made by the Bombay High Court in another case⁹, are here quoted as they throw helpful light on certain aspects of a trade usage:-

"Whenever a custom prevails, it necessarily leads to the establishing of a contract, different in some particulars from the written contract, otherwise custom would be useless and would never be relied upon. But variation need not be contradiction or repugnance. In some cases it is, in some it is not. I think, in this particular case, it is not."

A notable case explaining the trade usage of Pakki Adat is Jot Ram Sher Singh, defendant-appellants versus Jiwan Ram Sheoli Mal, plaintiff-respondents¹⁰. There, the plaintiffs, grain merchants at Delhi, carried on business as Commission Agents at Shamli in the Muzaffarnagar district. The plaintiffs instituted a suit for accounts against the defendants. The allegations in the plaint were that they had purchased 21 Khattis (pits) of grain through the defendants as Commission agents, but they did not carry out their instructions and that they had rendered no accounts. The defendants in their written statement made out a case that they were not Commission Agents, but were pucca adatias and acted in completing the transaction entrusted to them in accordance with the Pakka adat system, which prevailed in the Shamli market. They stated that as Pakka adatias they were liable to the plaintiffs

9. Ruttansi Rowfi v. The Bombay United Spinning and Weaving Co. I.L.R. 41, Bombay.

10. A.I.R. 1932 Lahore, 633.

as principals and not as agents and they were, therefore, not liable to render any accounts.

The defendants further pleaded that the matter had been compromised and that the plaintiffs had promised him to pay Rs.1,868-6-6 with interest over and above what had been already received from them.

We are not concerned with a detailed examination of the various issues raised in the case, and the decisions thereon. We will confine our inquiry as to what the High Court regarded as the true test to decide pucca adat system and its chief characteristics. The following passage quoted from the Judgment is instructive :

"Both parties are agreed that delivery was intended and that the transactions were not of a wagering nature. They only differ as regards certain incidents of these transactions when they are effected through an agent who is known as pacca adatia. According to the defendants the position of a Pacca Adatia is not that of an ordinary agent who merely brings about a transaction between third parties but that he becomes personally responsible and both the buyer as well as the seller look to him alone for the fulfilment of their contract. If the original seller fails to fulfil the contract the pucca adatia is bound to find the goods and give delivery or pay damages. If the buyer fails to take delivery the pacca adatia can claim damages from him vide paras 5 and 6 of the dastoor-ul-amal."

The learned Judge proceeding further stated thus :

"It was next urged that the pacca adat usage relied on by the defendants in the case is unreasonable as it involves a conflict between the "adatias" interest and duty and should therefore not be recognized." In disposing of these objections the Court stated thus : "It is not suggested that the contracts were illegal, immoral or opposed to public policy and as such void under S. 22, Contract Act. It was for the parties to decide on what terms the Contract were to be entered into and if the plaintiff's chose to enter into the contracts with full knowledge of the commercial usage governing them there seems to be hardly any reason why they should not be held to be bound; thereby even if the usage does involve some conflict between the "agent's duty and interest. It may be pointed out however that the pacca adat usage is well recognized in Bombay and its main features appear to be similar to these pleaded in the present case."

Concluding the judgment his Lordship said "I accordingly hold that the custom is not unreasonable and is binding on the plaintiffs."

The case is important in as much as it suggests that in order that a usage or custom of the trade may be binding on the parties to a contract, it must not be illegal, immoral or opposed to public policy and it should not be unreasonable. The Court made out a remarkable point that as there was full knowledge in the parties regarding the nature and extent of authority exercised by a pucca datia, the contract based on usage

of the trade was not unreasonable inspite of the fact that it involved some conflict between the pucca adatias interest and duty. The Court did not regard such an usage of trade as opposed to positive law or being unreasonable.

As a comparative study an examination of some leading English cases on the subject appears necessary. In Robinson v. Mollett¹¹, the facts were these :-

An agent, a tallow broker was authorized by his principal to buy tallow for him. There was a custom in his trade to buy tallow in his own name in larger quantities than the principal needed. The agent allotted to his principal the amount of tallow required by him. The principal refused to accept the goods, whereupon the agent sold the tallow and sued the principal for the difference in price. The court dismissed the action of the agent on the ground that the principal was not bound by this custom of the trade of which he had no knowledge and furthermore because the effect was to make the agent a principal viz-a-viz third parties, which was inconsistent with the character of the broker. This case is important in two respects: First, it is an authority for the proposition that a principal is not bound by any trade usage of which he has no knowledge and second, that any trade usage which intrisically changes the nature of the relationship will be deemed unreasonable and, therefore, will not bind the parties.

11. (1875) L.R. 7 H.L. 802.

Another case in point is Black burn versus Hason¹².

There a country broker acting as an agent for an undisclosed principal instructed his London broker to sell the shares on the Stock Exchange. The London broker, having sold the shares, wanted to set-off against the purchase price a debt owned to him by the country broker. The court of appeal regarded this custom as unreasonable and, therefore, not binding on the parties for the simple reason, that it amounted to the legalizing the right of a country broker to pay himself out of money belonging to his principal rather than limiting him to his own funds.

In another important case, Fleet v. Marton¹³, an agent had brought raisins for his principal, a portion of which were rejected by him. The party from whom raisins were purchased sued the agent for non-acceptance. He gave evidence of a custom in the London Fruit Trade that if a broker refused to name his principal though disclosing his existence, the broker himself was liable. The court held that such an evidence was admissible. However, Blackburn J, doubted the correctness of this view.

The doubts expressed by Blackburn J. appear to be correct inasmuch as the recognition of such custom has the inevitable effect of making a broker liable as a purchaser when he is not so in fact.

12. 68 L.T., 510.

13. (1871) L.R. 7 Q.B. 126.

A third case in point is *Hutchinson v. Tatham*¹⁴.

There a broker without disclosing the name of his principal, signed a charter party as 'agents to merchants'. The following observations of the court may be noted :-

"There is good reason for such a custom, with respect to many branches of trade of a speculative character, where contracts are made through a broker to take advantage of the rise and fall of the markets, it may be all important that the names of the real principals should not be disclosed . . . If the custom does exist, its only effect is to add a term of the Contract, and to make the contract, which, *prima facie*, is that of the principal likewise the agent personally in a particular event." It was further observed by the court that there was no conflict between the custom so admitted and written terms of the contract for the custom does not vary or contradict the contract, but merely adds a new term.

On an analysis of the aforesaid cases the following board features concerning trade usages in English law may be noted :-

(i) In executing his express authority an agent has implied authority to act according to the usage and customs of the particular place; market, or business in which he is employed.

(ii) No agent, however, has implied authority to act in accordance with any usage or custom which is unreasonable, unless the principal had notice of such usage or custom at the time when he conferred the authority or to act in accordance with any usage or custom which is unlawful.

(iii) The question whether any particular usage or custom is unreasonable or unlawful is a question of law.

(iv) In particular, a usage or custom which changes the intrinsic character of the contract of agency or a usage or custom whereby an agent who is authorized to receive payment of money may receive payment by way of set off, or by way of a settlement of accounts between himself and the person from whom he is authorised to receive payment is unreasonable.

The Distinction drawn between custom and usage in article 298 of Halsbury's laws of England are as follows :-

(1) Immemorial local customs can be clearly distinguished from particular trade or local usage, unfortunately these two terms have been often confused,

(2) In the case of mercantile usage; their importance chiefly lies in the fact that they are imported as a term of the contract.

(3) Mercantile usages lack three of the distinguishing features of customs properly so called, first they need not have existed from time immemorial, secondly, they need not be confined to a limited locality; thirdly, usages, however, extensive if they happen to be contrary to positive law, will not be sanctioned by the Courts. Customs on the other hand may be inconsistent with the general law of the country.

15. See page 202 et. seq. - Halsbury's Laws of England, Vol. II, Third Edition.

Certain important questions arise in discussing custom or usage of trade as a distinct source of implied authority of an agent. The questions are mainly two. They are (i) why is an ordinary custom distinguished from trade usage or custom of the trade? (ii) What is the meaning and scope of the terms "reasonableness" and "against law of public policy."

From an examination of some English cases we find that usage can be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life.¹⁶ It may also be defined more fully as a particular, course of dealing or line of conduct which has acquired such notoriety that persons dealing in that business must be taken to have intended to follow that course of dealing or line of conduct, unless they stipulate otherwise either expressly or impliedly.

A custom on the other hand has been defined to be "a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm."¹⁷ In two essential particulars custom differs from usage of the trade. They are (i) the necessity of the existence of a custom either actually or

16. For Judicial definitions of usages, or for passages from which the nature of usage can best be ascertained, the following cases may be looked into : (a) Hutton v. Warren (1836) 1 M & W 466 (b) Re North Western Rubber Co. Ltd. and Hittenback & Co. (1908) 2 K.B. 907, C.A. at R. 923 per Buckley L.J. (c) Nelson v. Dahl (1879) 12 Ch.D. 568 C.A. at R. 575 per Jessel M.R.

17. Halsbury's Law of England 3rd ed. p. 158.

presumptively from time immemorial, (2) Confinement of all customs to a definite limited locality. In other words there cannot be a custom in one place to do something in another place. It follows as a necessary corollary from the aforesaid nature of customs that it cannot extend to the whole country nor can it be applicable to every member of the public for, in either of these cases, it would amount to the common law of the country.

In its strict legal sense custom exclusively denotes an immemorial local custom.

It is to be lamented that some of the Judges have confused between the words 'custom' and 'usage', and have made indiscreet use of the words.

The essential requirements of trade usages are :-

(1) Notorious (2) Certain (3) reasonable and (4) must not offend against the intention of any legislative enactment 18(a & b). The importance of an usage lies in the fact that it is well known and not that it traces its origin to antiquity.

The meaning of the term 'Notoriety' is that it must be well known at the place to which it applies, it need not be known to all the world nor even that it should be known to the person against whom it is assented. The usage must be capable

18. For Judicial dicta upon the general essential requirements of a valid usage - See (a) *Devonald v. Rosser & Sons* (1906) 2 K.B. 728, C.A. at p. 743 per *foréwell* L.J., (b) *Strathlorne Ss. Co. Ltd. v. Hugh Baird & Sons Ltd.*, (1916) S.C. H.L. 134 at p. 136 per Lord Buckmaster, L.C.

of ready ascertainment by any person who wishes to enter into a contract of which that usage would form part.

Every usage must be certain.¹⁹ It must have as much certainty as the written contract itself. The reason is obvious usage is read as a term of the Contract and unless it is specific, it cannot be utilized for the purpose for which it is chiefly intended.

A usage must also be 'reasonable'. A usage cannot be deemed reasonable unless it can be regarded as fair and proper and such as honest, right minded and reasonable man would adopt. A usage which is founded on the general convenience of all parties engaged in a particular business can never be regarded as unreasonable. An arrangement which it would not be unreasonable for individual persons to adopt by express agreement cannot be regarded as unreasonable if it be adopted as an usage.

Any usage, however, extensive will not be permitted to prevail if it be directly opposed to positive law, as it will amount to a defiance and obviously contrary to fundamental principle.²⁰

Evidence of usage has been admitted as supplementing the terms of a contract relating to marine insurance, charter

19. *Sagar v. H. Ridehalgh & Sons Ltd.* (1931) 1 Ch. 310 C.A. *Strathborne S.S. Co. Ltd., v. Hugh Baird & Sons Ltd.*, 1916 S.C. (H.L.) 134 at 138 per Lord Buckmaster L.C. and at p. 140 per Lord Shaw.

20. *Goodwin versus Roberts* (1875) L.R. 10 Ex. Ch. 337 at page 367.

parties, bills of lading, sale of goods, stock exchange transactions, building brokers and actors and even to landlords and tenant.

The Restatement of Agency states the American Law as follows in section 36 :- "Unless otherwise agreed, an agent is authorised to comply with relevant usages of business if the principal has notice that usages of such a nature may exist." It is stated in the comments that the authority of an agent is to be interpreted in the light of usage, is not effective to contradict the specific terms of an authorization or the known desires of the principal; nor to make unnecessary a formality required by law."²¹

Comments on section 36(c) indicate certain rules by which knowledge of the usage may be inferred, to be possessed by the principal. Those circumstances are when the principal and the agent carry on business at the place where he ordinarily conducts his business. The rule is very obvious because the principal must be aware of the usages prevailing in the place or market where he himself carries on business. But it is equally evident that if the principal does not carry on that business, knowledge cannot be imputed to him. The idea is that if an agent has notice that the principal does not know of the usages; the agent is not authorized to avail of those usages, if the result of following them would be to enter into transactions different from those intended by the principal.

21. Section 36 Comments 6. Restatement of Agency Second p.125.

Again, if a non-professional principal employs a professional principal, the agent can observe the usages of his profession in the locality, so far as he reasonably believes that the principal will be in the know of them and intends that his agent would follow them with advantage. An agent will be deemed entitled to such a belief if the usages in question are reasonable and consistent with the best interest of the principal.

Examining comments "on (d) principal and Agent in different communities" we find that usages prevailing in a different place from where the principal normally carries on his business, it will be presumed that he permits his agent to follow the usages prevailing there provided "they are consistent with the declared purposes of the principal and are not unfair to him."²² It has been further stated in the comment thus "ordinarily the agent should not act in accordance with a usage which not merely permits the execution of his authority with respect to the subject matter but which, in addition, enlarges the functions which he is to perform, unless he has reason to believe that the principal appointed him with such custom in mind."²³

The various inferences drawn by the courts in America, from usage and custom the following has to be borne in mind :
 "The rule is that where a principal entrusts to his agent the management of business with respect to which there is a known and generally recognized usage, as to third persons dealing with

22 and 23. Restatement of Agency (Second) Section 36 Comment (d) Page 126.

such agent the principal will be held to have intended him to act in accordance with such usage; and in the absence of notice thereof, third parties will not be bound by any limitation upon such usual authority. "But this rule has its limitations, for instance, it is said by Mechem in his recent work on the Law of Agency, Section 281; "In order to give the usage this effect, it must be reasonable it must not violate positive law, and it must have existed for such a time and become so widely and generally known as to warrant the presumption that the principal had it in view at the time of the appointment of the agent; but if the usage was a purely local and particular one; the principal may repel this presumption of knowledge by showing that in fact he had no notice of it."

The American Law on the subject may be thus summarized : While usage or custom of trade may be employed for interpreting a contract or controlling its execution, it cannot be relied on for the purpose of changing its intrinsic character provided it is known to the party sought to be charged thereby, or is so well settled and so uniformly acted upon as to create a reasonable presumption that it was known to both contracting parties and that they contracted with reference to it.²⁴

Under Tennessee Law, usages or customs or trade, to be effectively binding in law, must be imperative, and compulsory in character and so well known as to affect the person to be

24. Milwaukee & Syoming Inc. Co. v. Johnston 35 Nob. 554, 53 N.W. 475 (1892) : See Prof. R.E. Mathews, Work on "Cases and Materials on Agency and Partnership" Second Edition P. 155 note 6.

bound with knowledge of them and raise the presumption that he dealt in reference to them.²⁵

In *Jarka Corporation of Baltimore v. Pennsylvania R. Co.*²⁶, it was held that a custom prevailing only in the part of Baltimore to the effect that it was duty of railroad embraced within its transportation contract to bear the cost of shifting each of a string of cars⁵ placed alongside pier so as to make it accessible in turn of ships tackle was not such a general 'custom' as would establish a rule of law resulting in the addition of an implied term to contracts of transportation established by purchased tariffs as a matter of law.

In *U.S. versus Stanolind Grude Oil Purchasing*²⁷, the court makes out a very important point in suggesting a criteria for a general usage. It is stated in the judgment that a usage recognized and observed by those engaged in a particular trade throughout a state is a 'general usage' even though usage is not observed in every individual transaction. In *Sickelco v. Union Pac. R.Co.*,²⁸ the court makes out some important points which have to be borne in mind as a criterion for judging the validity or applicability of an alleged usage.

In the aforesaid case, it has been held that a usage or custom of trade must be certain and uniform in order to be

25. *Tennessee Enamel Mfg. Co. v. Stoves Inc.*, 190 F. 2d. 863.

26. 130 F. 2d. 804.

27. 113 F. 2d. 194.

28. 111 F. 2d. 746.

binding and it is not sufficient that it is merely as certain as the nature of the business to which it applies will permit and a loose or variable practice or alleged usage which leaves some material element to individuals discretion will not control the activities of the parties to the contract. A custom which is general and established raises a presumption of its reasonableness and the burden of proof is on party asserting its unreasonableness.²⁹ In most of the American states, the law is that a custom cannot be looked to change a rule of law. In *Peebles versus Prudential Insc. of America*³⁰, the customary rights and incidence universally attaching to the subject matter of contracts in the place where made are impliedly annexed, to the language and terms of the instrument unless expressly excluded.

In *Dixon Irmaos & Cia Ltd., versus Chase Nat. Bank of City of New York*³¹, the Court laid down an important principle of law to the effect that when usage or custom is considered with relation to the terms of a contract, it is done upon the theory that the parties contracted with the usage or custom in mind to the end that in construing the contract the Court may arrive at what the parties intended by the words used and with such proof of contracting parties may be held to have inferred that they would be bound by such usage. In another important case *Wilson Distilling Co. v. Foust Distilling Co.*³²,

29. *Shipley v. Pittsburgh & L.E.R. Co.* 83F, Supp. 722.

30. 110 F. 2d. 76.

31.

32. 60 F. Supp. 373.

the court laid down an important principle that custom or usage may not be shown to vary the terms of a written contract unless the custom or usage is so well established, general and uniform that parties are presumed to contract with reference thereto.

This case it is submitted does not lay down the correct law for it is a well known principle of law that express terms always excludes all implied terms flowing from any of the diverse sources of implication including custom or usage of the trade. If, however, the court merely was speaking of a 'custom of the realm' which has the force of law, undoubtedly in such a case it must have precedence over the written term of a contract.

In *Crooks Termina Warehouses Chicago, iii, versus U.S.*³³, the Court laid down a principle of law which helps to clarify the apparent anomaly presented by the case just cited above. The court held in this case that an express provision in a written contract cannot be varied or modified by custom or usage but where the provisions of the contract are ambiguous evidence of custom or usage may be received to show the intention of the parties.

Reviewing the American case law on the subject of implied authority, flowing from usage of trade in favour of an agent it must be pointed out that the Restatement of Agency already referred to earlier no doubt clarifies certain doubtful points, for instance it has elaborated the various circumstances in which a principal will be presumed to have knowledge of an

33. 92 Ct. Cl. 401.

usage of trade, and so far as it goes it is most commendable. It is however to be lamented that neither the Restatement nor the American cases throw any light on the differences that exist between custom and usage of trade. Far from explaining the reasons that may properly be advanced for holding that custom and usage of trade require different ingredients for their existence, no where do we find that this question ever presented itself to the mind of the great American Judges. It is respectfully submitted that such an important question ought to receive their attention.

Having examined the Indian Law and comparative law in England and America, we are driven to the conclusion that none of the laws come to our juristic expectations. Atleast one very important point has not been touched upon and it is why the requirements for the existence of custom and usages of trade are different. To the writer it appears that from their very nature, trade usages have entirely a different^{ly} function to perform. They are a magnified form of a course of dealing confined to a particular business and sometime to a certain place only where businessmen concerned adopt for their own convenience a certain course of dealing. If this thesis were to be accepted the conclusion is irresistible that a trade usage must dispense with the ingredients of antiquity, uniformity or notoriety.

The purpose and history of trade usage and customs account for their respective differences. Before concluding the discussion of the subject it appears necessary to discuss

some of the important problems of policy and purpose that under-ly the principles of law. Obviously, the purpose of a trade usage is to facilitate businessmen in adopting a certain course of conduct in their business for otherwise agents in respect of such matters have constantly to obtain permission from their principals. The problem really is what should be the necessary requirements for establishing a trade usage which would bind the principal, agents and third party. In England notoriety of trade usage is insisted upon, but not so in India. A trade usage is regarded to be an implied term of a contract. It is, therefore, necessary that the interest of the principal and the third party must also be protected. The Indian law, therefore, does not insist on the notoriety of a trade usage as a necessary requirement, but that it should be well known and that the principal should be aware of the existence of a trade usage on which the agent relies in dealing with the third party. The American Restatement of Agency has dealt at some length the way to find out whether in a certain state of circumstances a principal will be deemed to have knowledge of a trade usage and it appears necessary that in drafting a new section in the Indian contract Act we may utilise the benefit of the discussion to be found in American Law, as enshrined in the American Restatement. There is another point to be considered in regard to trade usages and it is as to what limits should be imposed within which trade usages can be permitted to prevail. As already stated earlier the purpose of trade usages are limited. It is usually to be

found that when considerable number of men of business carry on one side of a particular business they are apt to set up a custom which acts very much in favour of their side of the business and so long as they do not transgress with some fundamental principles of right and wrong they may be permitted to establish such a trade usage but it is necessary that the trade usage must not be fundamentally unjust to other people and it has, therefore, been deemed necessary that when a trade usage is sought to be enforced against the person who is ignorant of it; it will be deemed to be unreasonable, contrary to law, and void. In fairness, therefore, to the principal the agent and the third party it appears necessary that the ingredients of trade usages should be that they are reasonable, certain, well-known, not against positive law. Unfortunately, in the Indian Contract Act we have no section which lays down the requirements of a trade usage subject to which it can form a part of the contract as an implied term. It is, therefore, recommended that a section should be added in the Indian Contract Act which clearly lays down the ingredients of a trade usage and also that trade usage would form an implied term of a contract between businessmen wherever it prevails. In drafting the new section it is recommended that help should be taken from the American Restatement of Agency, second edition, by adding some illustrations given there explaining the circumstances in which knowledge in the principal will be presumed for the existence of a trade usage which will bind him, and also add some illustrations given there to explain what is reasonable, certain and against positive law.

CHAPTER VIC O N C L U S I O N

Having examined at some length the entire Indian Law bearing on the subject of the implied authority of an agent, certain broad conclusions can now be drawn. The Indian law is contained in the Indian Contract Act, 1872, and it is no wonder that it does not keep a breast of modern changes that have been brought about by enormous growth of business, industry and trade in post independence era. In the Agency field consisting of the relation of principal, agent and the third party, many new problems now arise as a consequence of expanding business relationship with all its attendant complexities. The existing law was suitable only because trade and commerce were in their infancy.

The new problems that require solution are many, and have been mentioned and discussed in the previous chapters under appropriate heading, and also in the introduction of the thesis. It may be recalled that both the relevant sections of the Indian Contract Act that bear on the subject of implied authority of an agent as well as their Judicial interpretation fail to furnish any satisfactory solution of the problems. The author accordingly has endeavoured to suggest changes in the existing law, as well as a change in judicial outlook, so that the law may meet modern requirements of an expanding and progressive society.

A perusal of the thesis would show that most of the recommendations made for amendment of the existing law are mainly drawn from the English and American law. The author is of the view that since business conditions in India after the post independence era are not different from those prevailing in these foreign countries (U.K. and U.S.A.), the agency laws of these countries, which have successfully operated in these countries, can be utilized with equal benefit in India, provided we keep in mind the environmental differences existing between India and the other foreign countries - U.K. & U.S.A. - and make necessary adjustments.

The other important point that is noteworthy is that Judges in India, while deciding cases on Agency, have utterly failed to discuss even by way of observation, the two important theories, referred to on pages 8 to 17 of the thesis, which the judges in England have regarded as the basis of implying terms in a contract. The author is of the opinion that such a discussion was very necessary in order that the Bar and the Bench alike would have benefitted in tackling future litigation concerning implied authority of agents. The Judges in England and America have discussed the respective merits and demerits of these two theories and the same has greatly facilitated and enlightened the Bar and the Bench with the inevitable consequence that the legal development of the branch of law we are here considering has been very satisfactory. The author, therefore, trusts that in future our Judges will adopt the same practice and confer benefit on the Bench and Bar alike. Before

concluding the thesis, it appears necessary to discuss, what appears to the author, a very redeeming feature of Indian Law. In Sec. 187, Indian Contract Act, 1872, there occurs the words "circumstances of the case", and the language of the Section read as a whole, on a proper interpretation, shows that implication of authority arises from the "circumstances of the case".

Unfortunately, decided cases in India do not suggest that the expression can be interpreted as widely as the courts have done in England. It may be recalled that the courts in England have presented a theory already referred to in the introduction of the thesis, that terms can be implied according to circumstances of the case, and it is interesting to note that the illuminating discussion already referred to shows that terms can be implied in a contract on the basis of the changed social and economic circumstances in society. The author is of the opinion that the same interpretation can be adopted by our Judges, and that will have the salutary effect of ensuring proper legal development of the implied authority of an agent in India. Regarding other shortcomings, as well as merits, enough has already been indicated in the foregoing chapters and do not need repetition. The author trusts that in presenting this thesis, he has made some contribution to legal learning, especially, so, as the subject of study presented a virgin soil. The author trusts that the discussion will be found to be of interest, and of some value to the members of the Bar and the Bench, as well as to scholars of law.